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# FCC Record

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# FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-516**

In the Matter of

Amendment of Section 73.202(b), RM-6927
Table of Allotments,
FM Broadcast Stations.
(Hardinsburg, Kentucky)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 30, 1989; Released: November 20, 1989**

By the Chief, Allocations Branch:

1. J & J Broadcast Partners (petitioner) has requested the allotment of Channel 282A to Hardinsburg, Kentucky, as that community's second FM service. Petitioner submitted information in support of its proposal and stated its intention to apply for the channel, if allotted.

2. Our engineering analysis reveals that Channel 282A can be allotted to Hardinsburg in compliance with the Commission's minimum distance separation requirements with a site restriction 3.0 kilometers (1.9 miles) east of the city.[1]

3. In view of the fact that Hardinsburg could receive its second FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Hardinsburg, Kentucky | 232A | 232A, 282A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 11, 1990,** and reply comments on or before **January 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Christopher D. Imlay
Julian P. Freret
Booth, Freret & Imlay
1920 N Street, N.W., Suite 150
Washington, D. C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 37-46-32 and West Longitude 86-25-48.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-517**

In the Matter of
Amendment of Section 73.202(b), RM-6979
Table of Allotments,
FM Broadcast Stations.
(Ogelsby, Illinois)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 30, 1989; Released: November 20, 1989**

By the Chief, Allocations Branch:

1. At the request of David B. Knoll (petitioner), the Commission considers herein a petition for rule making seeking the allotment of Channel 271A to Ogelsby, Illinois, as that community's first local FM service. Petitioner states his intention to apply for the channel, if allotted.

2. Channel 271A can be allotted to Ogelsby, Illinois, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. In view of the fact that Ogelsby could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Ogelsby, Illinois | -- | 271A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 11, 1990,** and reply comments on or before **January 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

David B. Knoll
1305 Smokey Row Lane
Carmel, Indiana 46032

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates are North Latitude 41-17-43 and West Longitude 89-03-34.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-523**

In the Matter of

Amendment of Section 73.202(b), RM-6929
Table of Allotments,
FM Broadcast Stations.
(Royston, Georgia)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 20, 1989**

By the Chief, Allocations Branch:

1. Oculus Broadcasting Corporation ("petitioner"), licensee of Station WBIC(FM), Royston, Georgia, has filed a petition for rule making requesting the substitution of Channel 279C3 for Channel 279A at Royston, Georgia, and modification its license for Station WBIC(FM) to specify the higher powered channel. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 279C3 can be allotted to Royston in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.2 kilometers (6.3 miles) northwest.[1]

3. As requested, we shall also propose to modify the license of Station WBIC(FM) to specify operation on Channel 279C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Royston or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. In view of the fact that Royston could receive its first wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Royston, Georgia | 279A | 279C3 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 11, 1990,** and reply comments on or before **January 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Charles P. Sims, President
Oculus Broadcasting Corporation
431 Turner Street
Royston, Georgia 30662

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for this allotment are North Latitude 34-19-59 and West Longitude 83-12-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-522

In the Matter of

Amendment of Section 73.202(b), RM-6967
Table of Allotments,
FM Broadcast Stations.
(Jackson, Tennessee, and
Caruthersville, Missouri)

## NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

**Adopted: October 31, 1989; Released: November 20, 1989**

By the Chief, Allocations Branch:

1. At the request of CR Broadcasting, Inc. (petitioner), licensee of Station WMXX(FM), Channel 276A at Jackson, Tennessee, the Commission considers herein a petition for rule making seeking the substitution of Channel 276C2 for Channel 276A at Jackson, and the modification of Station WMXX(FM)'s license to specify operation on the higher class co-channel. Petitioner also suggests the substitution of Channel 286A for Channel 276A at Caruthersville, Missouri, and the modification of the license for Station KLOW(FM) to specify the different frequency in order to accomplish the upgrade at Jackson. Petitioner states its intention to apply for the new channel at Jackson, if allotted.

2. We believe the public interest could be served by proposing the substitution of Channel 276C2 for Channel 276A at Jackson, Tennessee, based on the fact that there is an expression of interest in providing the surrounding area with additional wide coverage area FM service. Channel 276C2 can be allotted to Jackson in compliance with the Commission's minimum distance separation requirements at the petitioner's proposed transmitter site,[1] if the suggested channel change is made at Caruthersville.[2]

3. As requested, we shall propose to modify the license for Station WMXX(FM) at Jackson to specify operation on Channel 276C2 in lieu of Channel 276A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Jackson.

4. We are herein issuing a *Show Cause Order* to Pemiscot Broadcasters F-M, licensee of Station KLOW(FM) at Caruthersville, seeking comments as to why its license should not be modified to specify operation on Channel 286A in lieu of Channel 276A. Commission policy requires that Station KLOW(FM) be reimbursed for the reasonable costs of changing its frequency. Petitioner has failed to state its willingness to reimburse Station KLOW(FM) for the reasonable costs of changings its facilites. In order for further consideration to be given to this proposal, petitioner must state, in comments, its willingness to comply with the reimbursement requirements.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Caruthersville, Missouri | 276A | 286A |
| Jackson, Tennessee | 268A, 276A, 281C | 268A, 276C2, 281C |

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Pemiscot Broadcasters F-M, licensee of Station KLOW(FM), Channel 276A, Caruthersville, Missouri, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 286A in lieu of Channel 276A.

7. Pursuant to Section 1.87 of the Commission's Rules, Pemiscot Broadcasters F-M, may, not later than **January 11, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Pemiscot Broadcasters F-M., to furnish additional information. If Pemiscot Broadcasters F-M, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Pemiscot Broadcasters F-M, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Pemiscot Broadcasters F-M
142 West Third Street
Caruthersville, MO 63830

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **January 11, 1990,** and reply comments on or before **January 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Marnie K. Sarver, Esquire
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D. C. 20036
(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Petitioner's proposed site is located 13.1 kilometers (8.1 miles) south of Jackson. The coordinates are 35-30-00 and 88-50-00.

[2] Channel 286A can be allotted to Caruthersville at Station KLOW(FM)'s present transmitter site. The coordinates are 36-12-50 and 89-41-25.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-521**

In the Matter of

Amendment of Section 73.202(b), RM-6963
Table of Allotments,
FM Broadcast Stations.
(Lancaster, Wisconsin; Clinton,
Iowa; and Morrison, Illinois)

## NOTICE OF PROPOSED RULE MAKING AND ORDERS TO SHOW CAUSE

**Adopted: October 31, 1989; Released: November 20, 1989**

By the Chief, Allocations Branch:

1. At the request of K to Z, Ltd ("petitioner"), licensee of Station WAXL(FM), Channel 249A, Lancaster, Wisconsin, the Commission considers herein a petition for rule making seeking the substitution of Channel 249C3 for Channel 249A at Lancaster, and the modification of the license of Station WAXL(FM) to specify operation on the higher powered channel. In order to accomplish the upgrade at Lancaster petitioner requests the substitution of Channel 234A for Channel 249A at Clinton, Iowa, and the modification of the license for Station KCLN-FM at Clinton. Petitioner also requests the substitution of Channel 271A for Channel 236A at Morrison, Illinois, and the modification of Station WZZT(FM)'s construction permit. Petitioner states that if the allotment is made, it will apply for the channel. Petitioner further states that it will reimburse Station KCLN-FM at Clinton and WZZT(FM) at Morrison for reasonable costs incurred in changing frequencies.

2. Channel 249C3 can be allotted to Lancaster in compliance with the Commission's minimum distance separation requirements at Station WAXL(FM)'s present transmitter site,[1] provided the suggested channel changes are made at Clinton and Morrison. The channel changes at Clinton (Channel 234A for Channel 249A) and at Morrison (Channel 271A for Channel 236A) can also be made consistent with the Commission's separation requirements at the present transmitter site of Station KCLN-FM and WZZT(FM), respectively.[2] Therefore, we are herein issuing *Show Cause Orders* to Brisco Broadcasting, Inc., licensee of Station KCLN-FM at Clinton, and Morrison Broadcast Associates, permittee of Station WZZT(FM) at Morrison, seeking comments as to why their authorizations should not be modified to specify operation on Channel 234A in lieu of Channel 249A and Channel 271A in lieu of Channel 236A, respectively.

3. We believe the public interest would be served by proposing the substitution of Channel 249C3 for Channel 249A at Lancaster, and the necessary channel changes at Clinton and Morrison, thereby providing the area surrounding Lancaster with an opportunity to receive wide coverage area FM service. In addition, we shall propose to modify the license for Station WAXL(FM) at Lancaster to specify operation on Channel 249C3 in lieu of Channel 249A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Lancaster. Commission policy requires that Stations KCLN-FM and WZZT(FM) be reimbursed for the reasonable costs of changing freguencies. Petitioner has stated its willingness to reimburse both stations.

4. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Morrison, Illinois | 236A | 271A |
| Clinton, Iowa | 241C1, 249A | 234A, 241C1 |
| Lancaster, Wisconsin | 249A | 249C3 |

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Morrison Broadcast Associates, permittee of Station WZZT(FM), Channel 236A, Morrison, Illinois, SHALL SHOW CAUSE why its permit should not be modified to specify operation on Channel 271A in lieu of Channel 236A.

6. Pursuant to Section 1.87 of the Commission's Rules, Morrison Broadcast Associates may, not later than **January 11, 1990,** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Morrison Broadcast Associates, to furnish additional information. If Morrison Broadcast Associates, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Morrison Broadcast Associates will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Brisco Broadcasting, Inc., licensee of Station KCLN-FM, Channel 249A, Clinton, Iowa, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 234A in lieu of Channel 249A.

8. Pursuant to Section 1.87 of the Commission's Rules, Brisco Broadcasting, Inc., may, not later than **January 11, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Brisco Broadcasting, Inc., to furnish additional information. If Brisco Broadcasting, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information

furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Brisco Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Morrison Broadcast Associates
P. O. Box 387
Morrison, IL 61720

Brisco Broadcasting, Inc.
P. O. Box 875
Clinton, IA 52732

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **January 11, 1990,** and reply comments on or before **January 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James L. Zimmermann, President
K to Z. Ltd
130 West Elm Street
P. O. Box 587
Lancaster, WI 53813
(Petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] The coordinates are 42-50-18 and 90-40-14, which is located 3.7 kilometers (2.3 miles) southeast of Lancaster.

[2] The coordinates for Channel 234A at Clinton are 41-54-32 and 90-13-20. The coordinates for Channel 271A at Morrison are 41-50-16 and 89-55-29.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Application of General Electric Company, GE Subsidiary, Inc. 21, and MCI Communications Corporation for Authority to Transfer Control of RCA Global Communications, Inc.

File No. ENF-88-1

## MEMORANDUM OPINION AND ORDER

**Adopted: November 9, 1989; Released: November 20, 1989**

By the Commission:

1. Before the Commission is an Application for Review filed by Locals 9, 10 and 111 of the American Communications Association, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Regular Common Carrier Conference (the Teamsters) on June 17, 1988.[1] The Teamsters seek reversal of a May 16, 1988 order of the Common Carrier Bureau (Bureau) that authorized MCI Communications Corporation (MCI) to acquire RCA Global Communications, Inc. (RCA Globcom).[2] For reasons discussed below, we deny the Teamsters' application for review.

## I. BACKGROUND

2. The Teamsters argued below that the proposed acquisition of RCA Globcom by MCI would transform the international record carrier (IRC) industry from one in which no carrier controlled as much as 30 percent of the market for telex and other traditional record services prior to December 30, 1987, to an oligopoly in which two carriers would control about 85 percent of that market. The analysis of the Teamsters, which was based on record carrier data reported to this Commission, failed to recognize the existence of competition from other competitors and unregulated facsimile and enhanced service provider[3] and was not found persuasive by the Bureau. Reviewing the complete record, the Bureau found no evidence that MCI's acquisition of RCA Globcom would reduce competition in any relevant market. It concluded that the acquisition should result in improved efficiencies and strengthen MCI's ability to compete in both domestic and international markets and that grant of Applicants' request would serve the public interest, convenience and necessity.[4] In making the grant, the Bureau denied petitions of TRT Telecommunications Corporation (TRT), a competitor of RCA Globcom, and the Teamsters, both of which had sought denial of the application.[5] No party, other than the Teamsters, has sought review of the Bureau Order. On November 21, 1988, at the request of the Bureau, a supplemental evidentiary submission was placed in the record which contained information available to the Bureau in the Hart-Scott-Rodino materials on file with the Department of Justice and of which official notice was taken below. *See* note 43, *infra*.

## II. CONTENTIONS OF THE PARTIES

### A. *The Teamsters' Application for Review*

3. The Teamsters contend that MCI's acquisition of RCA Globcom violated the antitrust laws and that we should reverse the Bureau Order which authorized such acquisition. Pursuant to the Commission's statutory authority,[6] the Bureau reviewed potential anticompetitive effects of the proposed transaction. Although conceding that factors such as ease of entry may be relevant in a section 7 analysis,[7] the Teamsters contend that the Bureau's finding concerning ease of entry was contrary to our determinations in *International Competitive Carrier Policies*, 102 FCC 2d 812, 827 (1985), and therefore incorrect.[8] Further, while also conceding that a full evidentiary hearing may not have been required or even desirable in this proceeding, the Teamsters allege that the Bureau reached its decision in a factual vacuum and that "additional proceedings of some type were necessary to elicit facts which would support the [Bureau Order's] public interest findings."[9] The Teamsters contend that the Bureau Order does not quantify market concentration,[10] and is arbitrary and capricious because, in the Teamsters' view, it lacks sufficient factual findings required to make a section 7 merger analysis.[11] According to the Teamsters, the findings also violate the Department of Justice's Merger Guidelines and the antitrust laws, and are not in the public interest.[12] Accordingly, the Teamsters conclude that we should reverse the Bureau's decision.

### B. *The Applicants' Opposition to Application for Review*

4. Applicants contend that the Bureau Order authorizing MCI's acquisition of RCA Globcom is based on a legally valid public interest analysis which gave serious consideration to the antitrust consequences thereof and that the conclusions reached are fully supported by an adequate record. Accordingly, Applicants request that the application for review be summarily denied.[13] Applicants note that section 309(d)(2) of the Communications Act[14] places a heavy burden on a party filing a petition to deny and that we must deny such petitions when we find no substantial and material question of fact and that grant of the application would be consistent with the public interest.[15] Applicants contend that the Teamsters failed to identify any substantial and material question of fact and incorrectly attempted to shift the burden to Applicants and this Commission to prove there would be no adverse effect on competition in a market that the Teamsters have failed to demonstrate is the relevant market.[16] Relying on the Supreme Court's seminal decision in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), Applicants contend that interchangeability of use, or the cross-elasticity of demand between a telecommunications service and substitutes for it, is the key determinant in defining the relevant market in which to evaluate a proposed acquisition and that the Teamsters have failed to show why the relevant market should not include clearly substitutable services cited in the Bureau Order such as facsimile, computer-to-computer messaging and voice mail enhancements to IMTS service of AT&T and other carriers.[17] Applicants contend that the relevant market is essentially

international electronic messaging of all kinds, but that it is not necessary that we explore the outer edges of the relevant market for the purposes of this proceeding in light of Commission precedent for a Clayton Act market analysis and the Bureau's conclusion that the combined company would not have market power.[18]

5. In response to a Teamsters' contention that the information in Applicants' Opposition is of no evidentiary value because it was not supported by an affidavit when filed, Applicants argue that such contention is merely one of form over substance and should be summarily rejected. Applicants assert that the Teamsters have not contested a single factual assertion by Applicants concerning the types of services which compete with and are substitutable for traditional record services provided by IRCs. Applicants further assert that the Teamsters make no assertion that the information contained in Applicants' Opposition is factually inaccurate or incomplete and cannot be officially noticed by this Commission. Applicants also state that the Teamsters have not alleged how they have been prejudiced by admission into the record of a subsequently filed affidavit in this proceeding.[19]

### C. *The Teamsters' Reply*

6. In response, the Teamsters contend that the Bureau rejected all the market share data in the record and, accordingly, that the Bureau Order lacked any factual basis.[20] The Teamsters contend that, in their view, neither relevant product or geographic market was defined and thus, "requisite" findings were not made quantifying market shares of the companies operating in the non-international message telephone service (non-IMTS) product market.[21] According to the Teamsters, whether a merger of two horizontal competitors passes muster under section 7 of the Clayton Act must depend on a precise quantitative market analysis and this requirement was not satisfied in the Bureau Order.[22] Expanding the non-IMTS market to include substitutable services other than telex and other traditional IRC services would not, in the Teamsters' view, have more than a *de minimis* effect on its analysis that its computation of the Herfindahl-Hirschman Index (HHI) showed the transaction to be clearly unlawful.[23]

### D. *Supplemental MCI Filing*

7. In response to an informal staff request, MCI filed four studies and copies of documents that it had referenced in earlier pleadings and which were available for staff review as part of material submitted to the Department of Justice in fulfillment of requirements pursuant to the Hart-Scott-Rodino Act.[24] MCI also submitted additional documents for the record in further support of its contentions that international telex is but part of a much larger market which includes facsimile service; facsimile is inexpensive, flexible, easy to implement, and makes extensive use of IMTS; most nonusers of facsimile equipment who plan to obtain facsimile capability intend to use it with telephone service; telephone service is the primary international service; facsimile services and electronic mail service bureaus providing international electronic communications compete directly with telex; international telex usage will continue to decline relative to other segments of international telecommunications as the international market continues to expand; facsimile is growing rapidly, will continue to grow for the foreseeable future, and will spread world-wide because of the low cost of equipment, ease of use, and because facsimile usage is not restricted by time zones or language barriers. Thus, MCI maintains that real world experience has rendered inapposite the 1985 *International Competitive Carrier Policies* decision that IMTS and non-IMTS were not substitutable.

8. On the other hand, the Teamsters maintain that there is no global relevant market for telecommunications in fact or law and that the record in this proceeding does not warrant a change in our determination in *International Competitive Carrier Policies* that domestic and international telecommunications were distinct geographic markets and IMTS and non-IMTS were distinct product markets. The Teamsters continue to maintain that non-IMTS is the only relevant market and substantially equivalent to the sum of the telex, telegraph and private line services provided by the IRCs.

## III. DISCUSSION

### A. *Competitive Impact*

9. We must review the acquisition not only under the Communications Act, but also under section 7 of the Clayton Act, 15 U.S.C. § 18, over which we have direct enforcement authority. 47 U.S.C. § 602(d). Section 7 proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Under section 11 of the statute, this Commission is empowered to enforce section 7 in the case of common carriers.[25] The courts have construed this to mean that the requirements of section 11 of the Clayton Act and the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs the consequences with other public interest factors."[26] In other words, we are required to consider anticompetitive consequences as one part of our public interest calculus.[27]

10. The applicable judicial precedents direct that the section 7 analysis begin with a determination of the relevant market in which competition may be threatened.[28] In turn, in order to ascertain the market affected for purposes of section 7, we must delineate both the relevant "product" market (*i. e.*, the "line of commerce") and the relevant "geographic" market (*i. e.*, "section of the country").[29]

11. The relevant product market, according to Applicants, is either international telecommunications or electronic messaging. The Teamsters, on the other hand, contend that non-IMTS services, especially traditional record services historically provided by IRCs, such as telex, telegram and private line services, should be considered as the relevant market for the purposes of this proceeding. We agree with Applicants that the key determinant in defining the relevant product market is interchangeability of use, *i.e.*, the cross-elasticity of demand between a telecommunications service and substitutes for that service. Accordingly, services that are substitutes for non-IMTS services may properly be included in the relevant product market. The Bureau properly noted that the relevant market was not limited to traditional IRC record services but encompassed rapidly growing new and innovative non-IMTS services that we

previously had identified, including INTELSAT Business Service (IBS) and services provided by resellers and enhanced service providers.[30]

12. We previously determined that each country constituted a separate geographic market for purposes of determining what international common carriers lacked market power and therefore could be regulated on a streamlined basis.[31] While such analysis was not made in the context of a proceeding requiring analysis under section 7 of the Clayton Act, the Bureau's reliance on such determination of the relevant geographic markets for the purposes of this proceeding was reasonable.

13. Similarly, the Bureau properly went beyond the market data presented by the Teamsters in determining that the post-merger market would not permit any firm to exercise market power. The Teamsters' data indicate that, prior to the merger, six firms offered IRC service, as follows: RCA Globcom (29.74% of the IRC market); ITT (28.43%); WUI (MCI) (19.54%); TRT (10.75%); Western Union (6.75%); and FTC (3.43%). 3 FCC Rcd at 2804. However, ITT had recently acquired Western Union, resulting in an IRC market share of 35.18%, and with this acquisition, MCI would control 49.28% of the market. These market shares result in a pre-merger HHI of 2249, which increases to 2633 with the combination of ITT and Western Union. The acquisition of RCA Globcom by MCI would result in an HHI of 3795.[32]

14. In reaching its conclusion, the Bureau found that, based on all the evidence of record, the combination under consideration would not result in the accumulation of market power in MCI. In this regard, the Bureau properly considered the fact that reasonably substitutable services were available or could be provided by other existing international carriers. Because such services would require only the addition of terminal equipment, entry into this market would be relatively easy, and this ease of entry provides a strong deterrent to any exercise of market power by firms already providing the service. Morever, the Bureau properly relied on our previous finding that the non-IMTS international telecommunications market was vigorously competitive and that no United States carriers, including the traditional IRCs, had market power or were dominant in the provision of non-IMTS services for any geographic market.[33] The Teamsters have not provided probative evidence in the record on which a contrary conclusion could be based, nor has it submitted evidence to support the allegation that the proposed acquisition would result in MCI having market power in any relevant market (other than with respect to IMTS service to and from Guam where RCA Globcom already had market power). We find no basis for reversing the Bureau's conclusion that the Teamsters failed to show that the effect of MCI's acquisition of RCA Globcom would tend to substantially lessen competition in any relevant market.[34]

15. The Teamsters rely principally on HHI thresholds set forth in merger guidelines of the Department of Justice[35] in support of its claim that the subject acquisition was unlawful. However, such thresholds "are not bright line tests."[36] The Department recognizes that:

> [a] merger in a highly concentrated market may result in absolutely no ability to exercise market power if any attempt to restrict output/or raise price would be frustrated by new entry or expansion by fringe firms or if other factors would make successful collusion implausible.[37]

The goal of the Department's merger enforcement policy is to prohibit only "those mergers that would create, enhance, or facilitate the exercise of market power in the United States."[38] Accordingly, the Department does not automatically challenge mergers resulting in high market concentration. Rather, "analysis of factors other than concentration data is necessary to conclude that such mergers would create, enhance, or facilitate the exercise of market power."[39] For example, if, as here, entry into the relevant market is relatively easy so that existing competitors could not successfully raise price for any significant period of time, the Department is unlikely to challenge a merger in that market.[40]

16. The Teamsters failed to recognize or give appropriate weight to factors that act as constraints on the ability of any carrier to sustain excessive charges for non-IMTS services. Although our analysis of the non-IMTS market is sufficient to conclude that the Bureau acted correctly, we also note that the potential substitutability consideration of IMTS-based services would further support our decision to affirm the Bureau. Other potential competitive alternatives to telex, including computer-based messaging systems, voice mail and facsimile services will act, we believe, as a constraint on the market power of any firm to set excessive prices for non-IMTS services to many foreign points.[41] While these services are not in all respects the same as the service rendered by the IRCs, there is already some evidence of the substitutability of the services.[42] The record contains substantial evidence to support the conclusion, for example, that the market for electronic mail will continue to undergo substantial growth for the foreseeable future.[43] These factors demonstrate that, even under the scenario suggested by the Teamsters, there are strong marketplace deterrents to the exercise of any market power by any of the IRCs.

**B.** ***Adequacy of the Record***

17. The Bureau found that the record, and matters of which official notice might be taken, provided a sufficient basis on which to resolve the legal issues before it. The Teamsters contend vaguely that "some type" of additional proceedings to elicit facts which would support the Bureau's public interest findings is necessary.[44] Such contention is based on the Teamsters' mistaken conclusions that the Bureau rejected its market data (as distinguished from its arguments based on such data) and that the Bureau made no effort to identify the relevant markets and to quantify concentration therein. The Bureau found that IRC-reported data, on which TRT and the Teamsters relied, represented part of the relevant non-IMTS product market. The Bureau concluded, however, that no matter how substantial such part of the non-IMTS services market was, it continued nevertheless to be vigorously competitive and no carrier (including the existing ITT Worldcom/Western Union combination and the proposed MCI/RCA Globcom combination) had or would have market power to control prices or exclude competition because of other pertinent market factors including ease of entry and changing market conditions. We concur in the Bureau's analysis and conclude that the Teamsters have not justified their request for further proceedings.

## IV. CONCLUSION AND ORDERING CLAUSES

18. In light of the foregoing, we conclude that the Teamsters have not established any grounds to reverse the Bureau Order. After reviewing the record, we find that the Bureau properly concluded that the public interest would be served by approval of the proposed acquisition.

19. Accordingly, IT IS ORDERED, pursuant to section 1.115(g) of our rules, 47 C.F.R. § 1.115(g), that the Application for Review filed by Locals 9, 10 and 111 of the American Communications Association, affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Regular Common Carrier Conference, on June 17, 1988, IS DENIED.

20. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] The Application for Review was timely filed following grant of the Teamsters' unopposed request for a two-day extension of the filing date. Also before us are an Opposition to Application for Review (Opposition) timely filed by General Electric Company (GE), GE Subsidiary, Inc. 21, and MCI Communications Corporation on July 5, 1988 (collectively referred to herein as Applicants); a reply to that opposition timely filed by the Teamsters on July 14, 1988; supplemental materials filed by MCI on November 21, 1988; and a brief in response to such supplemental materials timely filed by the Teamsters on December 21, 1988.

[2] General Electric Co., 3 FCC Rcd 2803 (1988) (Bureau Order).

[3] *See id.*, 3 FCC Rcd at 2813 n.72.

[4] *Id.* at 2810.

[5] *Id.* The Bureau also denied a petition filed by IT&E Overseas, Inc. (which had sought to deny or condition approval of the proposed transaction insofar as it involved assets used to provide voice services originating on Guam) and a petition filed by ITT World Communications, Inc. (ITT Worldcom) (seeking the imposition of extraordinary conditions on a grant of the application). *Id.*

[6] 47 U.S.C. § 602(d).

[7] 15 U.S.C. § 18 (Clayton Act).

[8] Application for Review at 15 n.27.

[9] *Id.* at 17-18.

[10] *Id.* at 14.

[11] *Id.* at 13.

[12] *Id.* at 2.

[13] Opposition at 19.

[14] 47 U.S.C. § 309(d)(2) provides as follows:

> If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

[15] Opposition at 2.

[16] *Id.* at 3.

[17] *Id.* at 5-6.

[18] *Id.* at 9-12, *citing* Tymshare, Inc., Memorandum Opinion and Order, Mimeo No. 6325, released September 8, 1983 (File No. ENF-83-22) and GTE Corp. and Southern Pacific Co., 94 FCC 2d 235, 250 (1983).

[19] *Id.* at 13-15. *See* Bureau Order, *supra*, 3 FCC Rcd at 2811 n.30.

[20] Reply at 7.

[21] *Id.* at 2.

[22] *Id.*

[23] As the Bureau noted, the HHI is a tool used by Justice Department attorneys in determining which mergers or acquisitions to challenge. Bureau Order, 3 FCC Rcd at 2808. The Department expressed no objection to MCI's proposed acquisition of RCA Globcom. Nor has the Department sought to intervene in this proceeding in support of the Teamsters' views.

[24] Counsel for the Teamsters was given the opportunity to review all MCI submissions in full.

[25] 15 U.S.C. § 21.

[26] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980).

[27] *Id.* at 87, *citing* Denver and Rio Grande Western Railroad v. United States, 387 U.S. 485 (1967).

[28] United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. E.I. du Pont de Nemours and Co., 353 U.S. 586 (1957); Standard Oil Co. v. United States, 337 U.S. 293, 299-300 n.5 (1949); *see also* Department of Justice Merger Guidelines, 2 Trade Reg. Rpt. (CCH) § 4490, at § 4492 (1984).

[29] Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

[30] *See* Bureau Order, *supra*, 3 FCC Rcd at 2807; *see also* International Competitive Carrier Policies, *supra*, 102 FCC 2d at 820-21.

[31] 102 FCC 2d at 828-29.

[32] According to the Department of Justice merger guidelines, an HHI above 1800 may reflect a highly concentrated market. Thus, the character of the market, as defined by the HHI, was not changed by this merger, and, as noted previously, the Department did not challenge the merger.

[33] Bureau Order, 3 FCC Rcd at 2808; *see* International Competitive Carrier Policies, *supra*, 102 FCC 2d at 833, 846.

[34] We find it significant that no existing or potential competitor to RCA Globcom asked for review of the Bureau Order. Further, as noted by the Bureau, we also find it significant that the Department of Justice expressed no objection to consummation of the proposed acquisition following its review of the matter and of Applicants' filing pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. § 18(a).

[35] U.S. Department of Justice Merger Guidelines (June 14, 1984) (hereinafter "Merger Guidelines"), *reprinted in* 2 Trade Reg. Rep. (CCH) ¶¶ 4491-95.

[36] U.S. Department of Justice Antitrust Guidelines for International Operations, *reprinted in* 54 ATRR, No. 1369 (June 9, 1988), at page S-18.

[37] *Id.*

[38] *Id.* at S-6, *citing* Merger Guidelines, section 1.

[39] *Id.* at S-7 n.58.

[40] *Id.* at S-7, *citing* Merger Guidelines, section 3.3.

[41] More than three years ago, we recognized that the use of IMTS services in combination with Dataphone-type customer premises equipment indicated supply substitutability *from* IMTS *to* non-IMTS services. International Competitive Carrier Policies, 102 FCC 2d at 824 n.29, 827. While we affirmed our previous tentative conclusion that international telecommunications consisted of two primary product markets, *i.e.*, IMTS and non-IMTS, we also recognized that the line between IMTS and non-IMTS might well become "blurred" over time. *Id.* at 826 n.31.

[42] Once a growing service, telex seems to have leveled off and even declined from 1983 through 1988 as rates for telex increased. Telex minutes from the United States and other countries declined in 1986 for the first time after recording a long period of growth. The Balance of Payments Deficit in International Telecommunications Services, Industry Analysis Division, Common Carrier Bureau (Dec. 12, 1988) at 23-24 and Appendix L.

[43] *See, e.g.*, Mortensen, Adapting Electronic Mail to Management's Needs, Administrative Management, August 1987, at 26 (electronic mail market expected to double every year, reach 23 billion pieces in 1990 and 86 billion pieces in the year 2000); Beauchamp, Tanzer, A Case of Shinbo, Forbes, July 14, 1986, at 46, 47 (worth of worldwide fax market will be nearly $5 billion a year by 1990; McMillan, Facsimile Systems: A Communication Key, Office Systems, March 1987, at 44 (20% compound growth rate many experts predict for facsimile may be very conservative). *See also* Trends in the International Communications Industry, 1975-1987, Industry Analysis Division, Common Carrier Bureau (while international communications industry has grown substantially for the period 1975-1987, IRC revenues have declined in recent years); U.S. Telecommunications Trade in 1988, International Trade Administration, U.S. Department of Commerce, at attachment 5 (value of imported facsimile machines in the United States increased from $211.5 million in 1986 to $501.3 million in 1987 and $918.1 million in 1988).

[44] After the close of the usual pleading cycle, MCI supplemented the record at the staff's request with four of the five studies on which it had relied in previous pleadings. As discussed *supra*, at para. 7, this evidence was reviewed by the staff as part of the Hart-Scott-Rodino materials in the possession of the Department of Justice and upon inclusion in the official record, the Teamsters were provided with the opportunity to review it.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

VIACOM INTERNATIONAL INC.
and
CABLE HEALTH NETWORK, INC.,
Complainants,

v. File No. E-83-19

RCA AMERICAN COMMUNICATIONS, INC.,
Defendant.

## ORDER

**Adopted: November 2, 1989; Released: November 20, 1989**

By the Commission:

1. Before the Commission is a formal complaint filed on June 3, 1983, and amended June 9, 1983, by Viacom International Inc. (Viacom) and Cable Health Network, Inc. (CHN) against RCA American Communications, Inc. (Americom), now GE Americom. The complaint alleges that revisions filed by RCA Americom on May 29, 1981 (Transmittal No. 293), to its Tariff FCC No. 1 are unjust and unreasonable in violation of Sections 201(b) and 204(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 204(a). Under that tariff, Americom provides satellite transponders for lease on a long-term basis, originally specifying rates for a fixed period ending on July 31, 1988. Complainants, both customers for this service, seek damages due to an increase in the long-term service rates prior to expiration of the service term. For the reasons stated below, the complaint is denied.

## BACKGROUND AND SUMMARY OF ARGUMENT

2. On June 2, 1981, the Common Carrier Bureau suspended the subject tariff revisions for one day, instituted an investigation, directed Americom to keep account of all amounts realized by reason of the changes, and invited interested parties to file petitions requesting that specific issues be investigated. *See RCA American Communications, Inc.*, Mimeo No. 1289 (released June 2, 1981) (*Suspension Order*). Showtime Entertainment (Showtime), now Showtime/The Movie Channel, a wholly-owned subsidiary of Viacom's, was one of several parties proposing issues to be considered therein with respect to the revised increased rates for fixed term transponder service. The Bureau later identified specific issues for investigation, which encompassed all concerns raised in the complaint. *RCA American Communications, Inc.*, Mimeo No. 6153 (released August 6, 1985) (*Investigation Order*). Resolving the investigation in pertinent part, the Commission concluded that, with the exception of Americom's treatment of a portion of the revenues received from insurance proceeds covering the loss of its Satellite SATCOM F-3, the tariff revisions filed by Americom under Transmittal No. 293 were lawful. *RCA American Communications, Inc.*, 2 FCC Rcd 2363 (1987) (*Final Order*), *appeal filed sub nom. Showtime Entertainment v. FCC*, No. 87-1259 (D.C. Cir. June 12, 1987).[1]

3. Viacom and CHN have acknowledged in their amended complaint and subsequent correspondence that the tariff revisions complained of have been the subject of a separate investigation. They additionally acknowledge that, in the instant proceeding, the issue of whether the tariff revisions are just and reasonable is the same as the issue before the Commission in the investigation.[2] However, they also suggest that their purchase of a protection channel under the terms of the original tariff may warrant a different result in this case.

4. Americom, for its part, has argued that the investigation addresses all of complainants' allegations and that the complaint is redundant. It thus chose not to respond to the merits of the complaint but to respond instead to the inquiries in the separate tariff investigation.

## DISCUSSION

5. The Commission's rulings in the context of the tariff investigation effectively resolve the issues presented by the complaint in favor of the defendant. Although complainants suggest that their purchase of a protection channel may distinguish the instant case, they do not explain how the purchase of this channel expands or differentiates their cause of action from that subsumed by the investigation. Moreover, on the record, we see no basis for any such distinction. Given our finding of lawfulness and reasonableness with respect to the Transmittal No. 293 revisions, and the complainants' failure to allege any distinguishing facts, there is no basis upon which to make a finding of liability against Americom.

6. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r), that the complaint filed by Viacom International Inc. and Cable Health Network, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] The insurance issue was set for further investigation. *Final Order*, 2 FCC Rcd 2363, 2366, *recon. denied* RCA American Communications, Inc., 3 FCC Rcd 1184 (1988) (*Reconsideration Order*). The Commission has recently concluded this limited investigation with a determination that a refund or rate adjustment would not be required since application of the insurance payment to Americom's revenue requirement has only a nominal effect on rates and still leaves Americom, for the years at issue, with a rate of return significantly below the prescribed level recognized as reasonable in the *Final Order*. RCA American Communications, Inc., FCC 89-268, 4 FCC Rcd (released Aug. 28, 1989) (*Insurance Order*).

[2] Complainants state that they filed their complaint in order to preserve their right to damages under the statute of limitations, 47 U.S.C. § 415(c).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

CONUS COMMUNICATIONS COMPANY — File No. CSG-89-086-ML

For authority to modify a 4.6-meter Ku-band transmit/receive earth station (call sign E880209) at Washington, D.C. for the provision of service between the United States and Europe via PAS-1

MICROSPACE COMMUNICATIONS CORPORATION — File No. CSG-89-091-P/L

For authority to construct and operate a 7.0 meter Ku-band transmit/receive earth station at Raleigh, North Carolina for the provision of service between the United States and those points which PAS is authorized to serve

GE AMERICAN COMMUNICATIONS, INC. — File No. CSG-89-112-ML

For authority to modify a 9.0-meter Ku-band transmit/receive domestic fixed earth station at Vernon Valley, New Jersey to access PAS-1 for the provision of television service with associated audio between the United States and those countries which PAS is authorized to serve)

CABLE NEWS NETWORK, INC. — File No. CSG-89-113-P/L

For authority to construct and operate a 7.0-meter Ku-band transmit/receive fixed earth station at Atlanta, Georgia for the provision of television service with associated audio via the PAS system between the U.S. and those countries PAS is authorized to serve

IDB COMMUNICATIONS GROUP, INC. — File No. I-T-C-89-091

For blanket authority pursuant to Section 214 of the Communications Act of 1934 to establish channels of communication between the U.S. and the PAS satellite system for the provision of international communications service

## ORDER AND AUTHORIZATION

**Adopted: November 13, 1989; Released: November 20, 1989**

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority pursuant to Title III and Section 214 of the Communications Act of 1934, as amended, to construct new earth station facilities, modify existing domestic licenses and to establish channels of communications to provide service via the PAS-1 satellite between the United States and points to which Alpha Lyracom (d/b/a Pan American Satellite (PAS)) is authorized to serve. These applications were placed on the Commission's public notice and no comments were received.

## THE APPLICATIONS

2. *Conus Communications Company (Conus) (File No. CSG-89-086-ML).* Conus is a partnership which consists of television stations and television news entities that are using transportable Ku-band satellite uplink vans for remote broadcasts of news and other programming. The partner stations may be interconnected as a group to share news and other programming among themselves, or they may use their transportable uplink vans individually to broadcast remote news and sports events to their respective viewing audiences as they occur. In the instant application, Conus seeks authority to modify a 4.6-meter Ku-band transmit/receive earth station (call sign E880209) at Washington, D.C. to add PAS-1 as a point of communication for the provision of service between the United States and Europe.[1] Conus proposes to use the transmit/receive earth station to transmit video programming and associated single channel per carrier (SCPC) audio communications from the Washington, D.C. offices of Conus to various points in the United States, Canada and Europe and to receive video programming and SCPC audio communications from various points in the United States, Canada and Europe. Conus states that the use of the earth station to aid in the exchange of news and other programming will more fully permit the Conus stations to provide the public with quality news reports and a diverse and publicly responsive range of programming in a cost-efficient manner. Conus concludes that its operation via PAS-1 will be consistent with the *Separate Systems* [2] decision.

3. *Microspace Communications Corporation (MCC) (File No. CSG-89-091-P/L).* MCC seeks authority to construct and operate a 7.0-meter Ku-band transmit/receive earth

station at Raleigh, North Carolina for the provision of service between the United States and those points which PAS is authorized to serve. MCC states that it provides satellite transmission services for various customers which use MCC for occasional use video and full-time audio and data subcarrier services. According to MCC, the proposed transmit/receive earth station will meet the communications needs of its customers in a cost efficient manner. MCC states that it will operate via PAS-1 consistent with the *Separate Systems* decision and will not interconnect with the public switched message networks and will comply with the long-term lease requirements of that decision.

4. *GE American Communications, Inc. (GE American) (File No. CSG-9-112-ML).* GE American seeks authority to modify the easternmost antenna of three co-located 9.0-meter Ku-band transmit/receive fixed earth stations at Vernon Valley, New Jersey presently licensed under File No. 5502- DSE-ML-87 (Call Sign E9494) for the provision of occasional and full-time television and associated audio service via PAS-1 between the United States and those European countries which PAS is authorized to serve. GE American's modification will expand the antenna's range of azimuth from $158.5^0$-$242.3^0$ to $102.4^0$-$242.3^0$, and the arc of the satellite longitudes from $60.0^0$-$126.0^0$ to $3.0^0$-$126^0$ West Longitude and the range of antenna elevation angles from $19.7^0$- $40.1^0$ to $5.1^0$-$40.1^0$. GE American states that its application is in response to a commercial U.S. television network to provide uplink facilities for news, sports and other program matter for relay to Europe. GE American states that this method of operation will permit cost and technically effective private-line (non-switched) international satellite service consistent with the *Separate Systems* decision.

5. *Cable News Network, Inc. (CNN) (File No. CSG-89-113-P/L).* CNN seeks authority to construct and operate a 7.0-meter Ku-band transmit/receive fixed earth station at Atlanta, Georgia for the provision of international communications via the PAS system. CNN states that it is presently providing program service via the PAS-1 spacecraft through the use of a previously authorized PAS Miami, Florida earth station. CNN states that authorization of the new facility will allow it to directly access the PAS-1 spacecraft from a CNN earth station in Atlanta, Georgia for delivery of customized CNN program service to Europe. CNN states that it will provide its proposed service on a non-common carrier basis through the purchase or long-term lease of a transponder for communications not interconnected with the public switched message networks.

6. *IDB Communications Group, Inc. (IDB) (File No. I-T-C-89-091).* IDB requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the U.S. and the PAS satellite system for the provision of such international television, video, audio, data and voice services as PAS may be authorized to provide. Specifically, IDB requests authority to establish channels of communication between existing and future earth stations owned and operated or leased by IDB in the U.S. and those countries PAS is authorized to serve. [3]

7. Upon review of the above applications, we find that they are consistent with the Commission's *Separate Systems* decision which permits the access of the PAS separate satellite system subject to the limitations contained in the *Separate Systems* decision.[4] On several occasions the Commission has authorized PAS to operate its facilities for communications between the U.S. and specified countries once it was determined that U.S. obligations under Article XIV(d) of the INTELSAT Agreement had been fulfilled.[5] The instant applications seek authority to access the PAS system to provide services to those countries which PAS is authorized to serve. In view of these circumstances, we conclude that the grant of these applications is consistent with the Commission's *Separate Systems* policy and will serve the public interest.

8. Accordingly, IT IS ORDERED that the applications of Conus (File No. CSG-89-086-ML), MCC (File No. CSG-89-091-P/L), GE American (File No. CSG-89-112-ML), CNN (File No. CSG-89-113-P/L) and IDB Communications Group, Inc. (File No. I-T-C-89-091) ARE GRANTED and:

a. MCC and CNN are authorized to construct and operate the Ku-band earth station facilities set forth in their applications to access the space segment capacity via the PAS-1 satellite to provide private, non-common carrier services between the United States and the United Kingdom, Ireland, the Federal Republic of Germany, Luxembourg, Sweden, France, Monaco, Portugal, the Bahamas and those additional points which the PAS-1 satellite may be authorized in the future to serve;

b. the existing earth station licenses of Conus and GE American are hereby modified to add the PAS-1 satellite as a point of communication for service between the United States and those countries that PAS is authorized to serve; and

c. IDB is authorized to establish channels of communication via the PAS satellite system between the U.S. and those countries PAS is authorized to serve, using earth station facilities owned and operated or leased by IDB.[6]

9. IT IS FURTHER ORDERED that the applicants are restricted in their operation of the subject earth stations communicating with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

10. IT IS FURTHER ORDERED that this authorization is subject to Commission jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions stated.

11. IT IS FURTHER ORDERED that the applicants are restricted to operation of the proposed earth station in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

12. This authorization constitutes the final step with respect to the provision of separate satellite system services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

13. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.15 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] Conus states that this earth station is presently authorized to provide domestic communications between Washington, D.C. and points in the United States via all domestic U.S. satellite systems and to provide transborder communications between Washington, D.C. and points in Canada via the Canadian Anik satellite system and all domestic U.S. satellites that have been consulted under Article XIV(d) of the INTELSAT Agreement for transborder services.

[2] *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985).

[3] IDB states that one of the earth stations through which it proposes service will be its 9.2-meter Ku-band transmit/receive earth station facility at Staten Island, New York.

[4] 100 FCC 2d 1046 (1985), *recon.* FCC 86-144, April 17, 1986, *further recon.* 1 FCC Rcd 439 (1986).

[5] *See* Alpha Lyracom, d/b/a Pan American Satellite, 4 FCC Rcd 7174 (1989). PAS is authorized to provide service between the U.S. and Peru, the Dominican Republic, Costa Rica, United Kingdom, Ireland, Federal Republic of Germany, Sweden, Louxembourg, Brazil, Guatemala, Honduras, France, Monaco, Portugal, Argentina and the Bahamas.

[6] This authorization should not be construed to permit operation by IDB with earth stations that have not been authorized to communicate with the PAS satellite system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJG MARITEL CORPORATION — File No. I-T-D-89-008

Application for authority to discontinue service at VHF-FM Public Local Service Coast Station KIY 689 Tennessee Ridge, Tennessee.

## ORDER AND AUTHORIZATION

**Adopted: November 9, 1989, Released: November 20, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 24, 1989 by WJG Maritel Corporation (WJG), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from its VHF-FM Public Local Service Coast Station KIY 689 at Tennessee Ridge, Tennessee. The application was placed on public notice on August 30, 1989. No comments were received.

2. WJG, a Tennessee Corporation, is engaged in the business of furnishing Public Maritime Mobile Radio service at locations in Louisiana, Mississippi, Tennessee, Arkansas, Missouri, Kentucky, Illinois, Indiana, Pennsylvania, Minnesota, Michigan, Ohio and New York. By this application WJG proposes to discontinue the provision of VHF public maritime mobile radio service and close its public coast station KIY 689 at Tennessee Ridge, Tennessee, a rural community located on the Tennessee River. The approximate range of operations for this station is fifty miles along the Tennessee River north and south of the existing site, including Humphreys County. The population of Humphreys County is 16,000. The primary marine activity is trailered recreational boats which are launched from the many launch ways throughout the Land Between the Lakes Recreational Area.

3. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier service to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

4. In support of its application, WJG states that it is proposing to close the station because of minimal demand for service. The station has been receiving approximately 10 calls per month creating revenue of $100 per month. The expenses of the station are $1100 per month. WJG states that Tusculum Marine Radio maintains a VHF public coast station in the immediate vicinity of Tennessee Ridge, Tennessee which operates continuously. This company is ready and willing to handle all traffic. Further, the U.S. Coast Guard maintains safety and distress communications service throughout the Tennessee River Valley, including the entire coverage area of WJG's Tennessee Ridge station.

5. Upon consideration of the application IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via the instant station.

6. Accordingly, IT IS ORDERED that application File No. I-T-D-89- 008 IS GRANTED, and WJG Maritel Corp. is authorized to discontinue service via its VHF-FM Public Local Service Coast Station KIY 689 at Tennessee Ridge, Tennessee.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

### FOOTNOTE

[1] Public Coast Radiotelegraph Stations, 67 FCC 2d 790 at 795 (1978).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 88-2**
**Phase I**

In the Matter of

Filing and Review
of Open Network
Architecture Plans

**ORDER**

**Adopted: November 7, 1989; Released: November 7, 1989**

By the Commission:

1. The *BOC ONA Order* [1] announced the establishment of a Federal/State Joint Conference, pursuant to Section 410(b) of the Communications Act,[2] as an ongoing forum for state/federal cooperation to facilitate the development and implementation of Open Network Architecture (ONA). The Order stated that the Conference members would include the Chairman of this Commission, who will serve as Conference Chairman, one additional member of this Commission, and seven state Commissioners, one from each Bell Operating Company region. The Order also provided that we would appoint the state members in consultation with the National Association of Regulatory Utility Commissioners (NARUC). On May 4, 1989, we appointed two federal Commissioners and thirteen state Commissioners to the Joint Conference. [3]

2. We hereby appoint FCC Chairman Alfred C. Sikes, FCC Commissioner Andrew C. Barrett, and FCC Commissioner Sherrie P. Marshall to the Joint Conference, with Chairman Sikes to serve as Conference Chairman. They will fill vacancies resulting from the departure of FCC Chairman Dennis R. Patrick and FCC Commissioner Patricia Diaz Dennis, as well as a newly established third FCC seat on the Joint Conference.[4]

3. Commissioner Barrett, formerly of the Illinois Commerce Commission, and Commissioner Edward B. Hipp of the North Carolina Utilities Commission, have terminated their service as state members of the Joint Conference, and NARUC has nominated Chairman William F. Long of the Michigan Public Service Commission (PSC) and Commissioner Stephen O. Hewlett of the Tennessee PSC[5] to serve on the Joint Conference. Thus, we are also appointing Michigan PSC Chairman Long and Tennessee PSC Commissioner Hewlett to serve as members of the Joint Conference.

4. Accordingly, IT IS ORDERED, that FCC Chairman Alfred C. Sikes, FCC Commissioners Andrew C. Barrett and Sherrie P. Marshall, Michigan PSC Chairman William F. Long, and Tennessee PSC Commissioner Stephen O. Hewlett ARE APPOINTED as members of the Federal/State Joint Conference convened in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**FOOTNOTES**

[1] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 110, paras. 214-223 (1989) (*BOC ONA Order), pets. for recon. pending; app. for review pending sub nom., Pacific Bell and Nevada Bell v. FCC, No. 89-1194 (D.C.Cir.).*

[2] 47 U.S.C. § 410(b).

[3] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 4017 (1989) (*May 4 Joint Conference Order* ). We increased state membership on the Joint Conference from seven to thirteen members at NARUC's request.

[4] The appointment of a third FCC Commissioner to the Joint Conference is consistent with our desire to expand cooperation between state and federal ONA policymakers, as well as our decision in the *May 4 Joint Conference Order* to increase the number of state Joint Conference members. *Id.*

[5] Letter to Alfred C. Sikes, Chairman, FCC, from Paul Rodgers, Administrative Director, General Counsel, NARUC, September 22, 1989.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TRT TELECOMMUNICATIONS CORPORATION — File No. I-T-C-89-167

Application for authority to acquire and operate facilities for direct service between the U.S. and Haiti.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: November 9, 1989; Released: November 20, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application filed on September 20, 1989 by TRT Telecommunications Corp. (TRT) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Haiti. The application was placed on public notice on September 27, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Haiti by TRT.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89- 167 IS GRANTED, and TRT is authorized to:

a. lease from Comsat and operate one voice-grade satellite circuit between the Roaring Creek, Pennsylvania earth station and an appropriate satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Haiti, furnished by TRT's correspondent in Haiti;

b. lease from AT&T and operate one voice-grade circuit in the Roaring Creek earth station;

c. lease and operate one voice-grade circuit between the Roaring Creek earth station and Washington, DC; and

d. use said facilities to provide international lease channel services between the U.S. and Haiti and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRT and its correspondent in Haiti, and a copy of the agreement shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO.

File No. I-T-C-89-164

Application for authority to acquire and operate facilities for service between the U.S. and Guantanamo Bay, Cuba.

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

## ORDER AND AUTHORIZATION

**Adopted: November 9, 1989; Released: November 20, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 13, 1989 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire, and operate additional facilities for the provision of its authorized services between the U.S. mainland and the U.S. Naval Base at Guantanamo Bay, Cuba. The application was placed on public notice on September 20, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-164 IS GRANTED, and AT&T is authorized to:

a. activate up to 12 additional voice-grade circuits between its Coram, New York earth station and an appropriate domestic satellite;

b. lease to All America Cable and Radio, Inc. (AAC&R) additional transponder capacity in such domestic satellite; and

c. use said facilities together with matching facilities provided by AAC&R at Guantanamo Bay, to provide AT&T's regularly authorized services between the U.S. mainland and the U.S. Naval Base at Guantanamo Bay, Cuba.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 7, 1989**

## FCC ANNOUNCES SECOND MEETING OF THE ONA JOINT CONFERENCE

(CC Docket 88-2, Phase I)

The Federal/State Joint Conference on Open Network Architecture (ONA) will convene its second meeting at 10:30 on Tuesday, November 14, 1989, at the Boston Copley Place Marriott, 110 Huntington Avenue, Boston, Massachusetts. The meeting will be open to the public, although participation is limited to Conference members and FCC Commissioners.

The Joint Conference serves as an ongoing forum for state/federal cooperation to facilitate the development and implementation of ONA. The creation of a Joint Conference was initially announced in the Federal Communication Commission's *BOC ONA Order* (4 FCC Rcd 1 (1989)). Three FCC Commissioners and thirteen state commissioners serve as Conference members.

For further information contact Steven Gorosh, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047, or Sarah Lawrence, Office of Public Affairs, at (202) 632-5050.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 15, 1989**

## ILLINOIS CONSOLIDATED FILES PETITION FOR WAIVER REGARDING ACCESS SERVICE OFFERING
### Pleading Cycle Established

On October 25, 1989, Illinois Consolidated Telephone Company (ICTC) filed a petition for waiver of Part 69 of the Commission's Rules to permit the establishment of proposed rate elements and reallocation of the associated costs and investment for Operator Transfer Service (OTS). On the same date, ICTC filed Transmittal No. 38, scheduled to become effective December 9, 1989, to provide OTS service to access customers. This service would permit ICTC operators to transfer "0-" calls to participating interexchange carriers at the request of the end user who dials "0-."

Interested parties should consolidate any comments regarding the ICTC waiver petition with their petitions against the ICTC tariff filing. Consolidated pleadings are due no later than **November 27, 1989.** Reply comments concerning the waiver and the tariff transmittal may be filed no later than **December 4, 1989.**

Parties are requested to furnish copies of their consolidated pleadings and reply comments to International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of Illinois Consolidated Telephone Company's waiver petition, along with other related documents, may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all consolidated pleadings and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each consolidated pleading or reply must be filed with ITS.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**Released: November 15, 1989**

**PUBLIC NOTICE**

Commissioner Patricia Diaz Dennis releases separate statement in Memorandum Opinion and Order, FCC 88-299, released September 20, 1988, 4 FCC Rcd 7712.

## SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: AT&T's Tariff 15, Holiday Rate Plan

I concur in the Commission's decision to investigate this tariff. Because of the substantial legal and policy questions that it raises, however, I dissent from the majority's decision declining to suspend the tariff.

*Lawfulness of Single Customer Rates*

Tariffs should be suspended when they present substantial questions of lawfulness. *AT & T*, 86 FCC 2d 18 (1981). Under existing precedent, there is a strong likelihood that the Holiday Rate Plan (Tariff 15) is unlawful.

Tariff 15 is a discounted offering of AT&T's generally available Pro America II, which is a discounted rate for ordinary interstate long distance telephone service. The Tariff 15 rate is available only to Holiday Corporation. The questions, therefore, are: (1) whether this discount limited solely to Holiday is an unreasonable practice or classification under Section 202(b), which forbids unreasonable charges, practices, classifications, or regulations; and/or (2) an unreasonable discrimination or preference under Section 202(a), which forbids unjust or unreasonable discrimination in the provision of like communications services.

In cases interpreting these sections of the Act, the FCC has generally criticized conferring preferences on limited classes of customers. *See, e.g., Interconnection Facilities Provided to the International Record Carriers*, 63 FCC 2d 761 (1977), recon. den. 66 FCC 2d 517 (1977), aff'd sub nom. *Western Union International, Inc. v. FCC*, 568 F.2d 1012 (2d Cir. 1977), cert. denied 436 U.S. 944 (1978). *See also Telpak*, 23 FCC 2d 606, 616 (1970), aff'd in part sub nom. *AT & T v. FCC*, 449 F.2d 439 (2d Cir. 1971), where the Commission found that Section 201(b) did not permit, absent justification, preferential rates for a limited class of private line customers. Indeed, AT&T itself has previously argued that Section 202(a) bars such personal discrimination. *See American Trucking Associations, Inc. v. FCC*, 377 F.2d 121 at 130, (D.C. Cir. 1966), cert. denied 386 U.S. 943 (1967).

In passing on Sections 201 and 202 of the Communications Act, courts look to the legislative history of and cases decided under the Interstate Commerce Act ("ICA"). *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790 (D.C. Cir. 1980) (concurring opinion). Because one of the primary purposes of the ICA was to eliminate the discriminations and preferences that were common in the railroad industry, case law under the ICA is also critical of carriers singling out particular customers or classes of customers for preferential rates. *See New York v. United States*, 331 U S 284 (1947).

*Competitive Necessity*

AT&T contends that its Holiday Rate Plan is fully justified as a matter of competitive necessity. It asserts that its response to an offering made by MCI Telecommunications Corporation to Holiday is lawful based on past Commission precedent.

In none of the cases where the Commission has considered the lawfulness of discounts that were assertedly necessitated by competition, however, has the Commission ever found reasonable a discount limited to a single named customer. In fact, the Commission has given every indication that such individualized discounts, especially when offered by a dominant carrier, [1] would be highly suspect, if not unlawful on their face.

For example, the Commission has emphasized that volume discounts "should not restrict the availability of the offering to particular customers" and that "a carrier cannot lawfully restrict the customers or uses for a volume-discounted offering". *Private Line Rate Structure and Volume Discounts*, 97 FCC 2d at 949, 947. The Optional Calling Plan ("OCP") proceeding made clear that OCPs could not impose "unreasonable restrictions on customers, resale, sharing or interconnection". FCC 85-540 at para. 77. Because the Holiday Rate Plan is only available to Holiday, it is unavailable to others for resale, sharing or interconnection. Accordingly, it is inconsistent with prior Commission orders.

There is also substantial legal precedent under the ICA that different individualized customer rates cannot be justified by competitive conditions.

*See, e.g., Wight v. United States*, 167 U.S. 512 (1897) (competition does not justify a lower rate to one customer for substantially similar service) and *Seaboard Airline Railway Company et al. v. United States*, 254 U.S. 57 (1920) (the ICA's purpose is to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services).

*Policy Issues Cannot Satisfactorily Be Addressed In a Rate Investigation*

The majority concludes that an investigation of the issues beyond that possible in a tariff review is required for Tariff 15 (para. 38). I concur that a particularly important issue is "whether different standards can apply to MCI and other nondominant carriers than to AT&T." (para. 33).

The Commission has previously found that a non-dominant firm "cannot rationally engage in the type of unlawful discrimination condemned by Section 202(a) of the Act", *Competitive Carrier*, 85 FCC 2d at 31 (fn. omitted) and that "price and term differentials, when offered by carriers lacking price control, are indicative of competition-not of wealth-transferring price discrimination schemes". *Id.* The Commission, however, did not specifically address the lawfulness of single customer rates and did not analyze the law that is now before us.

If individualized rates for common carrier services are unlawful under the Communications Act, regardless of the carrier's classification as dominant or non-dominant, the Commission should, at a minimum, revisit its earlier statements that the pricing practices of non-dominant carriers cannot violate the Communications Act. The parties should pay particular attention to this issue.

***Conclusion***

I conclude that under existing Commission and court precedent, AT&T's Tariff 15 presents substantial questions of lawfulness, especially in view of AT&T's continued classification as a dominant carrier. It is well settled that once it is demonstrated that a carrier is offering the same service to different customers at different prices, the burden shifts to the carrier to justify such a practice as reasonable. *Western Union International, supra,* and *Ad Hoc Telecommunications Users Committee, supra.* For this reason, I would have suspended Tariff 15 and placed the burden of establishing the lawfulness of these provisions upon AT&T.

Because of the overarching issue of the lawfulness of single customer tariffs, it is appropriate for the Commission to consider also all carriers' customer specific offerings in this investigation.

**FOOTNOTE FOR STATMENT**

[1] The Commission regards price discrimination by a dominant carrier such as AT&T to be presumptively unlawful. *See, e.g., AT & T Company*, 89 FCC 2d 1000, n. 27 at 1007 (1982) ("Where price discrimination by a dominant carrier such as AT&T is not justified on the basis of costs or other reasons, it violates Section 202(a) of the Act.")

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

EVERGREEN BROADCASTING COMPANY
Evergreen, Colorado
*et al.*

**MM DOCKET NO. 84-397**
through
**MM DOCKET NO. 84-412**

For Construction Permit
for a New FM Station

**ORDER**

**Adopted: September 29, 1989; Released: October 2, 1989**

1. Of the 22 mutually exclusive applications originally filed for a new FM station in Evergreen, Colorado, only the ten applications filed by EverGreen Radio, Inc. (ERI), Evergreen Communications Company (ECC), Evergreen Ventures, Inc. (EVI), Evergreen Broadcasting Corporation II (EBC II), Group Y Communications Investment Partnership (Group Y), Janet Hunter Driggs (Driggs), Lord Broadcasting (Lord), Evergreen Broadcasting Company (EBC), Best-Evergreen Broadcasting Company (Best-Evergreen), and Interstate Broadcasting System of Colorado, Inc. (Interstate) are pending before the Commission.

2. In an initial decision, Administrative Law Judge Edward J. Kuhlmann disqualified Lord Broadcasting on a short-spacing issue, concluded that the other applicants were fully qualified, and granted Group Y's application on comparative grounds. *Payne Communications, Inc.*, 86D-3 (January 23, 1986). The Review Board affirmed the ALJ's disqualification of Lord on the short-spacing issue but selected ERI, rather than Group Y, as the comparatively superior applicant. *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1052-54 ¶¶ 4-10 (Rev. Bd. 1986). All ten applicants sought Commission review of the Board's decision.

3. Before the Commission could dispose of the parties' applications for review and the numerous related pleadings that are pending before the Commission, the parties reached a settlement agreement resolving this adjudicatory proceeding. On August 11, 1989, ERI filed a Petition for Leave to Amend its application, and the parties filed a Joint Request for Approval of Settlement Agreement. The settlement agreement provides for the grant of ERI's amended application and the dismissal of the nine competing applications. On August 24, 1989, the Mass Media Bureau filed Comments supporting both the Joint Request for Approval of Settlement Agreement and the Petition for Leave to Amend.

4. In its Petition for Leave to Amend, ERI requests that, subject to approval of the settlement agreement, the Commission accept an amendment reflecting changes in its engineering proposal and its ownership structure. Specifically, the amendment reports that ERI is changing its antenna site from Doublehead Mountain to Mount Morrison, and that this change will improve coverage of the proposed station. The amendment further reflects that Evergreen Radio Broadcasting Partnership (ERBP) will be substituted for ERI as the applicant. ERBP is a general partnership that will be 51 percent owned by Evergreen Radio Holding Company (ERHC) and 49 percent owned by Susquehanna Radio Corporation. Susquehanna is not a party to this adjudicatory proceeding, but ERHC is 60 percent owned by ERI and 40 percent owned by ECC, both of which are applicants in this proceeding.

5. The parties request that the Commission grant the Joint Request for Approval of Settlement Agreement, approve the settlement agreements between ERI and each of the competing applicants, grant ERI's amended application, and dismiss the competing applications filed by ECC, EVI, EBC II, Group Y, Driggs, Lord, EBC, Best-Evergreen, and Interstate. The parties further request that the Commission condition termination of the parties' hearing rights upon written notification by all of the dismissing parties that closing has actually occurred. Under the settlement agreement, Susquehanna will pay ERI $300,000 and ECC $200,000 in consideration for its 49 percent interest in the surviving applicant ERBP. Susquehanna has also agreed to pay each of the other applicants in this proceeding to dismiss their applications.[1]

6. The agreement between ERHC and Susquehanna provides that, for a period of one year after the station begins broadcasting under Program Test Authority, ERHC may, upon thirty days' written notice, require that Susquehanna purchase its 51 percent interest in ERBP for $2,000,000.[2] If, however, ERHC does not exercise this option during the first 60 days of the one-year period, Susquehanna may ask ERHC to buy its 49 percent interest in ERBP. In the event Susquehanna exercises this option, ERHC must either buy Susquehanna's 49 percent interest or sell its 51 percent interest to Susquehanna. Under the agreement, ERHC must repay all money advanced by Susquehanna to settle this proceeding and to construct, operate, and equip the station plus a 50 percent premium if it decides to buy Susquehanna's 49 percent interest.

7. ERHC has indicated, however, that it lacks the funds to buy out Susquehanna. Thus, although the agreement states that "[n]othing in this agreement shall be construed to create a right in Susquehanna to compel the sale or assignment of the interest of ERHC to Susquehanna[.]" the Bureau is correct that the practical effect of the agreement is to give Susquehanna the option of buying ERHC's 51 percent interest for $2,000,000 anytime during the first year of operation. In this regard, Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), requires that the Commission make a public interest finding regarding any transfer, of control of a licensee or a permittee. Therefore, notwithstanding the terms of the agreement, any transaction whereby neither ERI nor ECC (together or singly) retained a 51 percent interest in ERBP (or any successor entity) would effect such a transfer of control, which would require further Commission approval under Section 310(d). *See, e.g., Old Time Religion Hour, Inc.*, FCC 87I-097 ¶ 4 (September 8, 1987); *Scott & Davis Enterprises, Inc.*, FCC 83I-129 ¶ 1 (November 9, 1983).

8. The settlement agreement will be approved. The Joint Request for Approval of Settlement Agreement, filed on August 11, 1989, complies fully with the provisions of 47 U.S.C. § 311(c) of the Communications Act and 47

C.F.R. § 73.3525(a) of the Commission's rules, which govern settlement agreements. Attached to the Joint Request are copies of the settlement agreements between ERI and each of the dismissing applicants. The Joint Request states that approval of the settlement agreements will serve the public interest by conserving the resources of the parties and of the Commission, and by expediting the inauguration of new FM broadcast service in Evergreen, Colorado.

9. In accordance with the requirements of section 311(c) of the Communications Act, and section 73.3525 of the Commission's rules, the parties also submit statements under penalty of perjury from each party to the various settlement agreements. The statements under penalty of perjury certify that their respective applications were not filed for the purpose of entering into or carrying out a settlement agreement, and that approval of the settlement agreement will serve the public interest by expediting service to the public.

10. The Joint Request further notes that the surviving applicant ERBP will be 51 percent owned by ERHC, which is, in turn, 60 percent owned by ERI and 40 percent owned by ECC. Thus, through their joint ownership of ERHC, two of the original applicants will retain control of the surviving applicant. Moreover, ERI, which was determined by the Review Board to be the comparatively superior applicant will be the majority partner of ERHC. Under these circumstances, the settlement agreement comports fully with Commission precedent. *See, e.g., Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325-26 ¶¶ 8-10 (Rev. Bd. 1987) (settlement agreement approved whereby original applicant retained 51 percent voting stock, and non-party was 49 percent voting stockholder, 91 percent equity holder, 51 percent option holder, and would provide all settlement, construction, and initial operating funds).

11. No objection has been received to ERI's petition for leave to amend. Based upon its review of the amendment, the Mass Media Bureau supports its acceptance. Accepting the attached amendment substituting ERBP for ERI and changing the engineering proposal to reflect a new antenna site will not require the addition of any new issues or parties, will not prejudice any party to this proceeding, and will expedite the resolution of this complicated adjudicatory proceeding. The petition for leave to amend is supported by good cause, and therefore, may be granted.

12. However, the Mass Media Bureau states in Comments supporting ERI's amendment that ERI's amended proposal complies with all of the Commission's technical rules except for 47 C.F.R. § 73.316(b)(2) of the Commission's rules, which prohibits the use of an FM directional antenna with a radiation pattern varying more than 2 db per 10 degrees of azimuth. *See Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments By Using Directional Antennas*, 4 FCC Rcd 1681, 1686 ¶ 39 (1989). Although ERI will exceed this limitation in the direction of the Table Mountain Receiving Zone which it must protect under 47 C.F.R. § 73.1030(b) of the Rules, its proposed antenna site will not be short-spaced.

13. Moreover, the Table Mountain facility has monitoring equipment capable of detecting whether the proposed station's directional antenna is operating as proposed. Thus, any deviation by ERI from its authorized antenna pattern can be detected and corrected. According to the Bureau, the staff waives section 73.316(b)(2) where the applicant is using a directional antenna to protect the Table Mountain Receiving Zone and not to justify a short-spacing request. Pursuant to the Bureau's suggestion that a waiver is appropriate given the presence of monitoring equipment at the Table Mountain facility, compliance with section 73.316(b)(2) will be waived.

14. ACCORDINGLY, IT IS ORDERED, Pursuant to delegated authority under 47 C.F.R. § 0.251(f) of the Commission's rules, that the Petition for Leave to Amend, filed on August 11, 1989, by EverGreen Radio, Inc. IS GRANTED; that the attached amendment IS ACCEPTED; that Evergreen Radio Broadcasting Partnership IS SUBSTITUTED for EverGreen Radio, Inc. (MM Docket No. 84-412 and File No. BPH-821215BG); and that compliance with 47 C.F.R. § 73.316(b)(2) IS WAIVED.

15. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement, filed on August 11, 1989, by EverGreen Radio, Inc., Evergreen Communications Company, Evergreen Ventures, Inc., Evergreen Broadcasting Corporation II, Group Y Communications Investment Partnership, Janet Hunter Driggs, Lord Broadcasting, Evergreen Broadcasting Company, Best-Evergreen Company, and Interstate Broadcasting System of Colorado, Inc. IS GRANTED; that the attached settlement agreements ARE APPROVED;[3] that the application of Evergreen Radio Broadcasting Partnership (File No. BPH-821217BG) for a new FM radio station on channel 243C at Evergreen, Colorado IS GRANTED; and that the applications of Evergreen Communications Company (File No. BPH- 821217BC), Evergreen Ventures, Inc. (File No. BPH-821217AI), Evergreen Broadcasting Corporation II (File No. BPH-821217AV), Group Y Communications Investment Partnership (File No. BPH-821217AZ), Janet Hunter Driggs (File No. BPH-821217BE), Lord Broadcasting (File No. BPH-821217AE), Evergreen Broadcasting Company (File No. BPH-821216AC), Best-Evergreen Company (File No. BPH-821217AC) and Interstate Broadcasting System of Colorado, Inc. (File No. BPH-821217AO) ARE DISMISSED.

16. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED as moot: (a) Applications for Review, filed on January 27, 1987 by Lord Broadcasting, on February 9, 1987 by Evergreen Broadcasting Company, Group Y Communications Investment Partnership, Janet Hunter Driggs, Interstate Broadcasting System of Colorado, EverGreen Radio, Inc., Best-Evergreen Broadcasting Company, Evergreen Communications Company, and Evergreen Ventures, Inc., and on February 10, 1987 by Evergreen Broadcasting Corporation II; (b) Motion to Accept Filings, filed on February 10, 1987 by Evergreen Broadcasting Corporation II; (c) Oppositions to Applications for Review, filed on March 9, 1987 by Evergreen Ventures, Inc., and on March 10, 1987 by Evergreen Broadcasting Corporation II, EverGreen Radio Inc., Group Y Communications, Evergreen Broadcasting Company, Janet Hunter Driggs, Evergreen Communications Company, and the Mass Media Bureau; (d) Supplemental Comments on Applications for Review and Petition for Leave to File Supplemental Comments, filed on March 13, 1987 by Best-Evergreen Broadcasting Company; (e) Motion to Strike Bureau's Opposition, filed on March 27, 1987 by Lord Broadcasting and Opposition to Motion to Strike, filed on April 7, 1987 by the Mass Media Bureau; (f) Consolidated Reply, filed on March 18, 1987 by Lord Broadcasting and Motion to Strike Consolidated Reply,

filed on March 24, 1987 by the Mass Media Bureau; (g) Supplement to Application for Review and Motion to Accept Supplement, filed on April 10, 1987 by Group Y Communications; (h) Oppositions to Supplement to Application for Review and to Motion to Accept Supplement, filed on April 21, 1987 by Best-Evergreen Broadcasting Company, Inc., and on April 23, 1987 by Evergreen Radio, Inc.; (i) Second Supplement and Motion to Accept Second Supplement, filed on July 15, 1988 by Group Y Communications; (j) Oppositions to Motion to Accept Second Supplement, filed on July 19, 1988 by Evergreen Ventures, Inc., on July 26, 1988 by Evergreen Broadcasting Corporation II, and on July 27, 1988 by EverGreen Radio, Inc.; (k) Reply, filed on August 17, 1988 by Group Y Communications; (l) Notification of Elimination of Short-Spacing, filed on July 8, 1988 by Lord Broadcasting; (m) Opposition to Notification of Elimination of Short-Spacing, filed on July 21, 1988 by EverGreen Radio, Inc., Motion to Strike Opposition, filed on July 25, 1988 by Lord Broadcasting, and Opposition to Motion to Strike, filed on August 1, 1988 by EverGreen Radio, Inc.; (n) Supplement to Application for Limited Review, filed on May 12, 1989 by EverGreen Radio, Inc.; and (o) Motion to Strike Supplement to Application for Limited Review, filed on May 17, 1989 by Evergreen Broadcasting Company, and Opposition to EBC's Motion to Strike, filed on May 23, 1989 by EverGreen Radio, Inc.

17. IT IS FURTHER ORDERED, That the grant of a construction permit to Evergreen Radio Broadcasting Partnership IS SUBJECT to both the special operating conditions or restrictions usually specified for a station located near Table Mountain and the standard conditions specified for a new directional antenna.

18. IT IS FURTHER ORDERED, That the adjudicatory proceeding in MM Docket Nos. 84-397 through 84-400, 84-404 and 84-405, 84-407, and 84-410 through 84-412 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Diane S. Killory
General Counsel

By John I. Riffer
Associate General Counsel

**FOOTNOTES**

[1] Group Y will receive $1,000,000; EVI and EBC II will each receive $600,000; EBC will receive $515,000; Driggs and Lord will each receive $500,000; Best-Evergreen will receive $200,000; and Interstate will receive $50,000.

[2] The agreement specifies that Susquehanna shall acquire ERHC's 51 percent interest in ERBP within 30 days after written notice of ERHC's intent to exercise the option to be bought out. As consideration for its 51 percent interest, ERHC will get $1,000,000 when it delivers a validly executed conveyance of its unencumbered interest in ERBP and an additional $1,000,000 on the first anniversary of the delivery date.

[3] From an administrative standpoint, it is appropriate, as the parties request, that the hearing rights of the competing applicants terminate simultaneously. Thus, this Order approving the settlement agreements and terminating this adjudicatory proceeding shall become effective with respect to the parties' hearing rights when the Commission receives written notification that all of the transactions authorized by this Order have been finally consummated and the closing process has been completed. *See RKO General*, Inc., 4 FCC Rcd 5747, 5748 n.5.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v. File Nos. E-89-88 through E-89-110

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, et al.,
Defendants.

**ORDER**

**Adopted November 9, 1989; Released: November 9, 1989**

By the Chief, Common Carrier Bureau:

1. By an order issued September 8, 1989, in the above-referenced complaint proceedings, complainant's direct cases were ordered to be produced on November 13, 1989. *See MCI Telecommunications Corporation v. Bell Telephone Company of Pennsylvania, et al.*, 4 FCC Rcd 6836 (Com Car. Bur., 1989). Pursuant to the instant order, we now direct that submission of complainant's direct cases, defendants' reply cases, complainant's briefs and defendants' reply briefs be deferred to such future date as will be determined by the Common Carrier Bureau (Bureau). We are cognizant that this order conflicts with an earlier Bureau determination that time constraints imposed by the Federal Communications Commission Authorization Act of 1988 (FCCAA), Pub. L. No. 100-594, 102 STAT. 3021 (Nov. 3, 1988), preclude any deferral of prosecution of these complaints. *See Illinois Bell Telephone Company, et al. v. AT & T et al.*, 4 FCC Rcd 2690 (Com Car. Bur., 1989). We are re-interpreting the application of the FCCAA to this proceeding and, specifically, section 208(b)(1) of the Act, as amended, 47 U.S.C. § 208(b)(1), based on our conclusion that the time constraints imposed thereby do not mechanically apply in the instant case. We note that all of the parties previously requested that these complaints be viewed as "contingent" complaints and, in effect, be held in abeyance pending resolution of the tariff investigation in CC Docket No. 85-166 which involves the same basic issues that underlie these complaints. *See Investigation of Special Access Tariffs of Local Exchange Carriers, Memorandum Opinion and Order*, CC Docket No. 85-166, Phase I, FCC 86-52, (released Jan. 24, 1986) *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). We intend to resume prosecution of the complaints immediately following resolution of the tariff investigation.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the time for filing complainant's direct case in the above-captioned proceedings is extended from November 13, 1989 to a date to be determined in the future, and that the time for filing defendants' responses and reply cases is also extended indefinitely.

3. IT IS FURTHER ORDERED that the above-captioned proceedings be held in abeyance pending further Commission action.

4. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter Of

US SPRINT COMMUNICATIONS
COMPANY LIMITED
PARTNERSHIP

Application for authority to lease and operate facilities for service between the U.S. and Peru. File No. I-T-C-89-160

Application for authority to lease and operate facilities for service between the U.S. and Trinidad and Tobago. File No. I-T-C-89-161

Application for authority to lease and operate facilities for service between the U.S. and Jamaica. File No. I-T-C-89-162

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: November 9, 1989; Released: November 20, 1989**

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on September 1, 1989 by US Sprint Communications Company Limited Partnership (US Sprint), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for direct service between the U.S., on the one hand, and Peru, Trinidad and Tobago, and Jamaica, on the other hand, and beyond. The applications were placed on public notice on September 20, 1989. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Peru, Trindad and Tobago and Jamaica by US Sprint.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-160, I-T-C-89-161 and I-T-C-89-162 ARE GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 180 voice-grade satellite circuits between its Franklin, NJ earth station and an appropriate satellite over the Atlantic Ocean, connecting with a similar circuits between the satellite and earth stations in Peru, Trinidad and Tobago and Jamaica, furnished by US Sprint's correspondents;

b. use said facilities to provide US Sprint's regularly authorized services between the U.S. and the following points and beyond:

1. Peru - 24 voice-grade circuits;

2. Trinidad and Tobago - 60 voice-grade circuits; and

3. Jamaica - 96 voice-grade circuits.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between US Sprint and its correspondents in Peru, Trinidad and Tobago and Jamaica, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**CC Docket No. 87-135**

In the Matter of

Revision to amend Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies as it relates to the treatment of certain individual items of furniture and equipment costing $500 or less

## ORDER ON RECONSIDERATION

**Adopted: October 24, 1989; Released: November 21, 1989**

By the Commission:

## I. INTRODUCTION AND BACKGROUND

1. Eight parties[1] have filed petitions for reconsideration of our *Report and Order* in this proceeding released on July 22, 1988.[2] The *Report and Order* amended Part 32 of our rules to raise expense limits for items recorded in accounts provided for central office equipment (limited to tools and test equipment), furniture and office equipment, other communications equipment, and vehicles and other work equipment. On a prospective basis items costing $500 or less were to be expensed in the year of purchase rather than capitalized and depreciated over prescribed periods of time. Also on a prospective basis, carriers were relieved of continuing property record (CPR) requirements for items costing $500 or less that were purchased after the expense limit was raised. The then existing limit had been $200.

2. Generally, the petitioners request reconsideration of our decision to keep CPR requirements in effect for items costing between $200 and $500 that had been capitalized prior to the change in expense limits. They also request reconsideration of our decision not to segregate these items in the system of accounts and establish a special amortization period. In this reconsideration order we grant the petitioners' requests, with some modification.

## II. THE RECONSIDERATION PETITIONS

3. The petitioners are unanimous in seeking the elimination of CPR requirements for previously capitalized furniture, tools and other work equipment with a cost between $200 and $500 [3] and in requesting special amortization of the embedded balances relating to these items that are recorded in the affected accounts.[4] Several petitioners suggest that these items be segregated in subaccounts or subsidiary records and amortized over the prescribed average remaining lives of the investment.[5]

4. The rationale presented by the petitioners is also virtually identical. The petitioners maintain that the decision to leave CPR requirements in effect for previously capitalized items requires dual inventory systems and thereby offsets many of the efficiencies that the Commission sought to achieve. They claim newly purchased items that are expensed must be specially tagged to distinguish them from similar previously capitalized items. They further claim new internal procedures would have to be developed for taking inventories and training personnel to carry out the new procedures. The petitioners believe the costs associated with these processes would outweigh any benefits from the change in expense limits unless the CPR requirements are eliminated and the capitalized items costing between $200 and $500 are segregated in the accounts from other capitalized items and amortized separately.

5. The petitioners urge that the net investment in the segregated items be amortized over the average remaining lives of the investment at the effective date of the expense limit change. Such an amortization, they claim, would have minimal effects on revenue requirements.

6. On September 19, 1988, this Commission issued a Public Notice inviting comments on the petitions. No oppositions were filed to any of the petitions and only USTA filed reply comments.[6] Citing the lack of opposition to any of the petitions, USTA urged this Commission to reconsider its decision and adopt the suggested changes regarding the treatment of the embedded items.

## III. DISCUSSION

### A. *Continuing Property Records.*

7. In the *Report and Order* raising the expense limits, we stated our expectation that the change would relieve carriers of the burdens of tracking large volumes of items which are of relatively little consequence in relation to total plant in service. Since the CPR was already set up for the embedded balances and procedures were in place for maintenance of such records, we expected that appropriate relief from recordkeeping requirements would be afforded carriers by merely increasing the expense limits on a prospective basis. It is clear from the petitions, however, that new procedures would have to be developed and implemented if the relief sought in the petitions with respect to the CPR is not granted. Because the course taken in the *Report and Order* imposes burdens which offset at least part of the benefits originally intended by raising the expense limits, we are providing the relief the carriers seek with respect to the CPR requirements.

8. We adopt the recommendation made by the petitioners for a segregation of the investment in embedded items costing between $200 and $500 from other capitalized items. For segregation purposes we require the establishment of subsidiary records in the asset and accumulated depreciation accounts for recording the assets and the related accumulated depreciation for the embedded items that are the subject of this proceeding. For the items segregated in this manner, Continuing Property Records will no longer be required.

B. *Amortization Period.*

9. In the *Report and Order* adopting the expense limit change, we considered establishing a special amortization period of three, four, or five years. In the comments considered in the *Report and Order*, some parties favored a single amortization of three or five years, others favored allowing flexibility in setting the amortization period so carriers could adopt periods acceptable to state regulators, and others opposed any amortization because amortization would increase revenue requirements. After considering the options we chose not to establish a special amortization approach because a short amortization would unnecessarily increase revenue requirements and a flexible approach would result in widespread differences among the carriers and jurisdictions. We also noted that carriers are afforded an opportunity for capital recovery through regular represcriptions of depreciation rates.

10. The petitioners now urge a special amortization over the average remaining life of the assets which would effectively neutralize the revenue requirement impact. No party has filed an opposition to the suggestion. However, in examining the petitioners' request to amortize the embedded balances over the prescribed average remaining depreciable lives of the investment, we still find it objectionable to have the wide variety of amortization periods that this approach would produce. We conclude that a single amortization period would be more efficient, would put this matter to rest within a specific time frame, would maintain consistency among carriers in accounting for similar items, and would facilitate our monitoring of carrier implementation of amortization. Moreover, a single amortization period approach produced the desired results in an efficient manner when we last raised the expense limits from $50 to $200 in 1981.[7] We have decided that a single amortization period should be adopted for all carriers, but that it should be long enough to minimize the revenue requirement impact.

11. After reviewing the carriers' original estimates of the effects of amortization on revenue requirements, we believe that an eight-year amortization period should be sufficiently long to minimize the impact on rates in any jurisdiction. We require, therefore, that carriers shall segregate the embedded balances and associated accumulated depreciation as discussed in the preceding section and shall amortize the net investment amount over eight years. This shall be accomplished by monthly credits to the asset account subsidiary records and monthly debits to the accumulated depreciation subsidiary records. These monthly amounts shall be determined by dividing the subsidiary record balances by the number of months remaining for which amortization must be provided. The difference between the debit and credit amounts so determined will be charged to Account 6565, Amortization Expense--Other. At the end of the eight-year amortization period when the balances in the subsidiary record accounts have been fully amortized (at which time the balances in the asset account subsidiary records and the accumulated depreciation subsidiary records will be zero), use of the subsidiary records shall be discontinued.

12. Pursuant to Section 220(g) of the Communications Act of 1934, as amended, this Commission must give carriers at least six months notice when we change the applicable accounting rules and procedures. Thus, we cannot require carriers to adopt the new procedures until at least six months after release of this order. However, carriers will be permitted, if they wish, to adopt the requirements in this *Order on Reconsideration* as early as January 1, 1989.

## IV. OTHER MATTERS

13. We certify that the Regulatory Flexibility Act[8] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this *Notice* in the Federal Register. As part of our analysis of the petitions described in this Order, however, this Commission has considered the impact of the proposal on small telephone companies, i.e., those serving 50,000 or fewer access lines.[9] The action proposed herein would have a beneficial economic impact on 1370 such telephone companies because the changes discussed in this Order are expected to benefit all carriers, including those indirectly affected, by relieving them of certain record keeping and reporting requirements.

14. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to modify, by reducing, the information collection burden which the Commission imposes on the public. The modification in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

## V. ORDERING CLAUSE

15. IT IS ORDERED, That under the authority contained in Sections 4(i), 4(j), 220 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 220 and 405 the subject petitions for reconsideration ARE GRANTED to the extent and subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] Ameritech Operating Companies (Ameritech); The Bell Atlantic Telephone Companies (Bell Atlantic); South Central Bell Telephone Company, and the Southern Bell Telephone and Telegraph Company (BellSouth); The New York Telephone Company and the New England Telephone and Telegraph Company (NYNEX); Pacific Bell and Nevada Bell (Pacific Telesis); Southwestern Bell Telephone Company (SWBT); The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West); and The United States Telephone Association (USTA).

[2] 3 FCC Rcd 4464 (1988).

[3] Ameritech petition at 2, Bell Atlantic petition at 1, BellSouth petition at 1, NYNEX petition at 6, US West petition at 5, SWBT petition at 2, Pacific Telesis petition at 2, USTA petition at 1 and 2.

[4] Ameritech petition at 1, Bell Atlantic petition at 1, BellSouth petition at 1, NYNEX petition at 2, US West petition at 6, SWBT petition at 2, Pacific Telesis petition at 2, USTA petition at 2.

[5] NYNEX petition at 4, Pacific Telesis petition at 5, SWBT petition at 3, USTA petition at 2.

[6] In addition to the original petitions and the USTA reply comments, the record also contains *ex parte* presentations in support of amortization and suspension of the CPR requirements for the embedded amounts from BellSouth, dated August 25, 1988; SWBT, dated September 8, 1988; and Pacific Telesis, dated May 26, 1989.

[7] *Amendment of the Uniform System of Accounts to increase the dollar level for expensing minor items*, CC Docket No. 81-273, RM 3806, *Report and Order*, FCC 81-477 (released October 16, 1981).

[8] 5 U.S.C. §601, *et seq.* (1987).

[9] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS *Market Structure*, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board — **CC Docket No. 80-286**

In the Matter of

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands — **CC Docket No. 83-1376** RM 4436

## ORDER

**Adopted: October 26, 1989; Released: November 21, 1989**

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), we hereby appoint Federal Communications Commission Chairman Alfred C. Sikes to be Chairman of the Federal-State Joint Boards in CC Docket Nos. 80-286 and 83-1376. These appointments fill vacancies created by the resignation of former Chairman Dennis R. Patrick on August 7, 1989. Henceforth a copy of all filings in these proceedings shall be served on Chairman Sikes at the following address:

The Honorable Alfred C. Sikes, Chairman
Federal Communications Commission
1919 M Street, N. W.
Room 814
Washington, D. C. 20554

2. Accordingly, IT IS ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), that Alfred C. Sikes shall serve as Chairman of the Federal-State Joint Boards in CC Docket Nos. 80-286 and 83-1376.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-520**

In the Matter of

Amendment of Section 73.202(b), RM-6966
Table of Allotments,
FM Broadcast Stations.
(Levelland, Texas)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 20, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KLVT Radio, Inc. (petitioner), seeking the allotment of Channel 253A to Levelland, Texas, as that community's second local FM service. Petitioner states an intention to apply for the channel, if allotted. Channel 253A can be allotted to Levelland in compliance with the Commission's minimum distance separation requirements.[1]

2. In view of the fact that Levelland could receive its second local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Levelland, Texas | 288A | 253A, 288A |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **Janaury 11, 1990,** and reply comments on or before **January 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Kathryn R. Schmeltzer, Esquire
John Joseph McVeigh, Esquire
Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street, N.W.
Suite 800
Washington, D. C. 20037-1125
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The reference coordinates are 33-35-12 and 102-22-42.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

INTERNATIONAL MESSAGE SWITCHING, CORP. File No. I-T-C-89-122

Application for authority to operate as an international resale carrier.

**SECOND ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: November 9, 1989; Released: November 20, 1989**

By the Chief, International Facilities Division:

1. The above-captioned amendment filed on August 11, 1989 by International Message Switching, Corp. (IMS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the telex services of existing common carriers to provide international telex services between the U.S. and various overseas points. The amendment was filed in connection with IMS' application which initially requested authority to resell international switched voice services under the same file number. The amendment was placed on public notice on August 23, 1989 and no comments were received.

2. On September 25, 1989, the switched voice portion of IMS' application was granted, while the telex portion was still pending.[1] This order disposes of the telex portion of IMS' application.

3. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international telex services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[2] We find that the market will support additional carriers and that the added competition will be in the public interest. [3]

4. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international telex services to the general public by IMS.

5. Accordingly, IT IS ORDERED that the amendment to the application File No. I-T-C-89-122 IS GRANTED and IMS is authorized to provide international telex service by the resale of the international telex service set forth in FTCC's Tariff F.C.C. No. 16, RCA Global Communications, Inc.'s Tariff F.C.C. No. 90, TRT's Tariff F.C.C. No. 64, Western Union International's Tariff F.C.C. No. 5 and Western Union Corporation's Tariff F.C.C. No. 283 between the U.S. and the points listed in those tariffs.

6. IT IS FURTHER ORDERED that IMS is limited, under this order, to the provision of common carrier services only. Nothing in this authorization or in IMS' application should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**FOOTNOTES**

[1] *See International Message Switching Corp.*, 4 FCC Rcd 6997 (Com. Car. Bur. 1989).

[2] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[3] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH CO. — File No. I-T-C-89-165

Application for authority to acquire and operate facilities for service between the U.S. and the Netherlands Antilles.

## ORDER AND AUTHORIZATION

**Adopted: November 9, 1989; Released: November 20, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 13, 1989 by American Telephone and Telegraph Co. (AT&T), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate additional facilities for the provision of its authorized services between the U.S. mainland and the Netherlands Antilles and beyond. The application was placed on public notice on September 20, 1989. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-165 IS GRANTED, and AT&T is authorized to:

a. acquire from AT&T-Virgin Islands (ATT-VI), on an indefeasible right of user (IRU) basis, a whole interests in 30 circuits in the St. Thomas terminal of the St. Thomas-Tortola Digital Microwave System;

b. acquire from Cable and Wireless (C&W), on an IRU basis, a one-half interest in and operate one 2.048 Mbps channel in the Tortola-Saba section of the Digital Eastern Caribbean Microwave System (DECMS);

c. acquire from the Netherlands Antilles Government (NAG), on an IRU basis, a one-half interest in and operate one 2.048 Mbps channel in the Saba-St. Maarten section of the DECMS; and

d. use said facilities, in conjunction with previously authorized capacity in the Third Florida Cable and matching half-interests in facilities provided by NAG, to provide AT&T's regularly authorized services between the U.S. and the Netherlands Antilles and beyond.

3. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of IRU agreements between AT&T and AT&T-VI, C&W and NAG, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

| | |
|---|---|
| New England Telephone and Telegraph Company<br>Tariff F.C.C. No. 40 | Transmittal Nos. 998 and 1014 |
| New York Telephone Company<br>Tariff F.C.C. No. 41 | Transmittal Nos. 994 and 1011 |

**ORDER**

**Adopted: November 13, 1989; Released: November 14, 1989**

By the Deputy Chief, Common Carrier Bureau:

1. On July 3, 1989, the New York Telephone Company and the New England Telephone and Telegraph Company (NYNEX) filed Transmittal Nos. 994 and 998. The substance of each transmittal is identical, each proposing to modify the access ordering and cancellation procedures for its respective region. On July 19, 1989, MCI Telecommunications Corporation (MCI) filed petitions to suspend and investigate Transmittals 994 and 998, and US Sprint Communications Company Limited Partnership (US Sprint) filed petitions to reject, or alternatively, to suspend and investigate Transmittals 994 and 998.[1] NYNEX replied to these petitions on July 28, 1989 (NYNEX Reply). Transmittals 994 and 998 were revised by Transmittal Nos. 1011 (New York) and 1014 (New England) which were submitted on September 29, 1989. These revisions, which modified language contained in Transmittals 994 and 998, were unopposed. All of these transmitttals are scheduled to become effective on November 15, 1989.

2. Transmittals 994 and 998 proposed to establish new procedures and penalties for the cancellation and postponement of Switched and Special Access line orders. Under NYNEX's existing tariffs, its interexchange carrier (IC) customers have two options if they are unable to accept an access line on the date for which acceptance was originally requested or within 30 days thereafter. The IC may cancel the service and pay a cancellation fee, or NYNEX will begin billing for the circuit even though the IC has not formally accepted it for use. By Transmittals 994 and 998, NYNEX sought to eliminate the billing option from its tariffs; thus, if an IC was not able to accept the access line the order could be cancelled and cancellation charges assessed. NYNEX Description and Justification at 2.

3. NYNEX explained that the primary need for these changes was the large number of access orders that remain outstanding beyond 30 days after the original scheduled date. *Id.* NYNEX contended that these modifications were necessary because the billing option generated no revenue for its companies while tying up equipment and facilities. According to NYNEX, for Switched Access services which are billed on a per minute of use basis, it collected no revenues because there was no use on the idle circuit and because NYNEX removed its Minimum Monthly Usage Charge for Switched Access services in October 1987. *Id.* Therefore, it could not even assess a minimum charge for the idle line. For Special Access services, NYNEX alleged that its billing systems are not able technically to begin billing prior to customer acceptance; thus, no revenues are currently collected if an IC delays beyond 30 days the acceptance date of a Special Access line. *Id.*

4. US Sprint claims that implementation of the revisions in Transmittals 994 and 998 would likely cause significant hardship to ICs and their end users, including delayed service and increased administrative burdens. US Sprint also contends that access customers should not be penalized because of NYNEX's inability to bill its customers. US Sprint Petition at 4 and n.4. MCI stated that these revisions could lead to double charging of fees when an acceptance date is changed more than once. MCI Petition at 2. Also, MCI charged that these revisions are one-sided because the NYNEX companies can be weeks late in their delivery of a circuit, while the IC has no recourse. *Id.* at 3. MCI acknowledged that NYNEX's tariffs permit customers to cancel access orders if NYNEX is more than 30 days late but claimed that this provision is meaningless because the customer's choice of access vendors is limited. *Id.* at 3 and n.6.

5. NYNEX replied that cancellation charges are necessary to discourage the over-ordering of access services as well as to minimize idle investment. NYNEX Reply at 3-4. It will assess no double charges, stated NYNEX, because charges are only assessed at the time costs are incurred. According to NYNEX, the petitioners have sole and exclusive control to avoid additional expense and delay because they control, at the time they order the line, the date by which service will be accepted. *Id.* at 5. NYNEX added that once an access order is placed, the customer may alter that requested service date for up to 30 days without charge so long as the customer has not been notified of the "service availability" date, which is the date NYNEX has scheduled for customer acceptance of the circuit. *Id.*

6. By Transmittals 1011 and 1014, NYNEX would reinstate the billing option for Special Access services, having developed a new billing procedure which enables billing prior to actual customer acceptance of a line. For Switched Access services, the NYNEX revision is different. Currently, for Switched Access services, NYNEX applies a Service Date Change Charge each time the IC changes the service date within 30 days of the original service date. After the 30 day period, NYNEX may cancel the order and impose cancellation fees. In Transmittals 1011 and 1014, NYNEX would expand the delay period from 30 to 60 days and would exercise its cancellation options only if the service date is more than 60 days from the originally scheduled service date.

7. The Common Carrier Bureau has reviewed New York Telephone Company Transmittal Nos. 994 and 1011 and New England Telephone and Telegraph Company Transmittal Nos. 998 and 1014, as well as the various pleadings. We conclude that the NYNEX transmittals, as revised, are not so patently unlawful as to warrant rejection, nor do they raise sufficient questions of lawfulness to warrant suspension and investigation at this time.

8. Accordingly, IT IS ORDERED that the petitions to suspend and investigate filed by MCI Telecommuncations Corp. and the petitions to reject or alternatively suspend and investigate filed by US Sprint Communications Company Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

**FOOTNOTE**

[1] Since both MCI's and US Sprint's petitions against each of the transmittals are virtually identical, we cite in this Order to their petitions filed against New England Transmittal 998.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 9, 1989**

**PLEADING CYCLE SET ON APPLICATION FOR REVIEW OF RAO LETTER 14**

On October 30, 1989, the People of the State of California and the Public Utilities Commission of the State of California (collectively, California) filed an application for review of RAO Letter 14, 4 FCC Rcd 7110 (Accounting and Audits Div. 1989). That letter required subject carriers to classify, on an interim basis, their inside wiring services as nonregulated activities for federal accounting purposes pending Commission action on remand of *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

In its application, California argues that RAO Letter 14 is inconsistent with, and legally insufficient to support the suspension of, Section 410(c) of the Communications Act, which requires the Commission to refer proceedings regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations to a Federal-State Joint Board. California also argues that the letter is contrary to the opinion in *NARUC v. FCC* and the Commission's decisions deregulating the installation and maintenance of inside wiring.

Interested persons may file comments on California's application no later than November 27, 1989. Replies should be filed no later than December 11, 1989. A copy of each pleading should be sent to the Accounting and Audits Division, Federal Communications Commission, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20554, and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact William A. Kehoe III, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-182

In the Matter of

Automated Reporting Requirements
for Certain Class A and Tier 1
Telephone Companies (Parts 31, 43,
67 and 69 of the FCC's Rules)

## ORDER ON FURTHER RECONSIDERATION

**Adopted: October 24, 1989; Released: November 21, 1989**

By the Commission:

### I. INTRODUCTION

1. On December 29, 1988, the United States Telephone Association (USTA) filed a petition for clarification and/or further reconsideration of the filing date for Table I of FCC Form 495A, Forecast of Investment Usage Report (Forecast Report), established in the *ARMIS Order*.[1] The Forecast Report consists of three tables, all of which are currently required to be filed annually at the same time that the cost support materials required by the Tariff Review Plan (TRP) are filed.[2] The next filing date for the TRP and the Forecast Report is April 1, 1990. USTA requests that Table I of the Forecast Report be filed annually on December 31 rather than on April 1. In the alternative, USTA suggests that all three tables continue to be filed at the same time as the TRP, as long as the "forecast period" applicable thereto consists of the current calendar year, plus the following two years. For the reasons set forth below, we deny USTA's petition for reconsideration but adopt rule changes that clarify when the three-year forecast period begins.

### II. BACKGROUND

2. In the *Joint Cost* proceeding, [3] we required that carriers allocate investment in network plant (*i.e.*, central office equipment and cable and wire facilities) between regulated and nonregulated activities based on the forecasted relative use of the plant over a three-year period. We also stated that we would monitor the cost allocation process and establish a data base for comparing actual and forecasted usage, and we directed that permanent reporting requirements be developed in this proceeding. In the *ARMIS Order*, we directed the staff to develop automated reports to collect the data needed to implement the *Joint Cost Order*. We specified that two of these reports, the Forecast Report and the Actual Usage Report, should be filed on an annual basis and no later than December 1 of the year prior to that in which the forecasts are to be used.[4] On reconsideration, we changed the filing date for the Forecast Report from December 1 to the date on which the TRP is filed (currently, April 1).[5] We also required that Form 495B, the Actual Usage Report be filed annually on April 1 for the previous calendar year.

3. On May 31, 1988, the Common Carrier Bureau established forms and instructions for the Forecast Report and the Actual Usage Report.[6] The Forecast Report, Form 495A, contains three tables. Table I reports the forecasted usage of regulated and nonregulated investment for the next three calendar years for each investment cost pool requiring a forward looking allocator. Table II reports the forecast of investment dollars in each investment pool and the allocation of that investment between regulated and nonregulated activities using the allocation ratio reported in Table I. Table III reports the regulated and nonregulated investment allocations for all network plant cost pools. The Actual Usage Report also consists of three tables: the first for actual regulated and nonregulated usage; the second for the actual amounts of investment allocated; and the third linking the total of all cost pool levels to the account level of the Joint Cost Report.[7]

### III. USTA'S PETITION

4. USTA requests that the Commission "clarify or reconsider the filing date for Table I of the Forecast Report in light of events since the Commission's *ARMIS Order* was first released."[8] USTA argues that the current filing date for Table I creates an inconsistency between our requirement that shared investment be forecast over a three-year period and our requirements for access charge filings. USTA bases this assertion on the fact that the TRP (and hence the forecast of investment) is to be filed on April 1, and in that forecast the carriers must forecast usage for the "three consecutive years following the effective date of the current annual access charge filing."[9] Because the next access tariff filing will be on April 1, 1990, for the period July 1, 1990, through June 30, 1991, USTA argues that carriers must forecast for four years (through 1993) in order to comply with that requirement.

5. To remedy this problem, USTA requests that the filing date for Table I (which contains the forecast for the following three years) be changed to December 31. Tables II and III would continue be filed concurrently with the TRP. USTA claims that its recommendation would fulfill our joint cost monitoring needs by preserving the calendar year reporting basis, while providing sufficient cost support material for access tariff filings by filing Tables II and III for the next access year. USTA indicates that an acceptable alternative to resolve this problem would be to continue to file all three tables concurrently with the TRP but with the forecast covering the current calendar year plus the following two years. No parties filed oppositions to or comments on USTA's petition.

### IV. DISCUSSION

6. We disagree with USTA that the current filing date for any part of the 495A Forecast Report should be changed. However, we agree that the current rules do not establish with sufficient clarity the date on which the three-year forecast commences, and accordingly we will clarify that matter.

7. As we noted in para. 3, *supra*, the three tables of the Forecast Report are designed to draw from each other. For example, the carriers report their projected usage of jointly used plant on Table I and use these projections to

complete Table II. Carriers must also draw on data from Table II to complete Table III. Moreover, the Forecast Report is designed to be compared with the three tables of the Actual Usage Report, which is filed annually on April 1. Therefore, to avoid confusion and the problems inherent with partial and fragmented report filings, both the Forecast Report and the Actual Usage Report must be consistent and must be filed simultaneously.

8. Moreover, as USTA notes in its alternate proposal, it is not necessary to change the filing date for any part of the Forecast Report to accomplish what USTA desires, which is a clarification that the report is to cover only a three-year period. Although we stated in the *ARMIS Reconsideration Order* that the forecast was for the "following calendar year", we agree that the first year of the forecast period should instead be the calendar year during which the forecast is filed, and the balance of the forecast period should be the following two calendar years. Because this definition of the three-year forecast period is not set forth in either Section 43.21(e) or 64.901(b)(4) of our rules, we will amend those sections accordingly. Also, we will change the identification of the filing date from the date upon which the TRP is filed to April 1. This change does not affect the actual filing date for 1990 and beyond, but it will establish the filing date with more certainty and eliminate an unnecessary cross-reference to the tariff filing procedures.

9. These amendments to Sections 43.21(e) and 64.901(b)(4) will also eliminate uncertainty which may exist as to whether the years covered by Forms 495A and 495B are calendar years or years during which access charges are in effect. Although our orders in this proceeding have clearly referred to calendar years, that is not the period now specified in Section 64.901(b)(4) and in certain instructions that the Common Carrier Bureau has issued under delegated authority.[10]

## V. PAPERWORK REDUCTION ACT

10. The change contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours on the public.

## VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 405, That the United States Telephone Association's petition for clarification and/or further reconsideration herein IS DENIED, except to the extent set forth above.

12. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 4(j), 201-205, 219 and 220 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) 201-205, 219 and 220 that Parts 43 and 64 of the Commission's Rules ARE REVISED, as set forth in the Appendix below, effective 30 days from publication of the text thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX

Part 43, Chapter 1 of the Code of Federal Regulations, Reports of Communications Common Carriers and Certain Affiliates, is amended as follows:

1. The authority citation for Part 43 continues to read as follows:

**AUTHORITY: Sect. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.**

2. Section 43.21(e) is revised to read as follows:

**43.21 Annual Reports of Carriers and Affiliates**

* * * *

(e) Each communications common carrier required by order to file a manual allocating its costs between regulated and nonregulated operations shall file, on or before April 1: (i) a three-year forecast of regulated and nonregulated use of network plant for the current calendar year and the two calendar years following, and investment pool projections and allocations for the current calendar year; and, (ii) a report of the actual use of network plant investment for the prior calendar year.

* * * *

Part 64, Chapter 1 of the Code of Federal Regulations, Miscellaneous Rules Relating to Common Carriers, is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

**AUTHORITY: Sect. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 48 Stat. 1077; 47 U.S.C. 201, 218, unless otherwise noted.**

2. Section 64.901(b)(4) is revised to read as follows:

**64.901 Allocation of Costs**

* * * *

(b)* * *

(4) The allocation of central office equipment and outside plant investment costs between regulated and nonregulated activities shall be based upon the relative regulated and nonregulated usage of the investment during the calendar year when nonregulated usage is greatest in comparison to regulated usage during the three calendar years beginning with the calendar year during which the investment usage forecast is filed.

* * * *

## FOOTNOTES

[1] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order*), *modified on recon.*, 3 FCC Rcd 6375 (1988) (*ARMIS Reconsideration Order*).

[2] *See* Access Tariff Filing Schedules, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988).

[3] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988); *petition for review pending*. Southwestern Bell Corp. v. FCC, D.C. Circuit No. 87-176 (filed December 14, 1987).

[4] *ARMIS Order*, 2 FCC Rcd at 5776.

[5] *ARMIS Reconsideration Order*, 3 FCC Rcd at 6379.

[6] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), 3 FCC Rcd 3762 (1988).

[7] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), 4 FCC Rcd 1040 (1988).

[8] Petition at 1.

[9] *See* 47 CFR Section 64.901(b)(4).

[10] We direct the Bureau to review the instructions that it has isssued in this proceeding to conform them to this *Order on Further Reconsideration*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

MMM HOLDINGS, INC. File Nos.
BTCCT-890615KF et al.
03342-CL-TC-89 et al.
3382-CF-TC-89 et al.

for Transfer of Control of LIN BROADCASTING CORPORATION 1641-DSE-TC-89 et al.

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 25, 1989** **Released: October 26, 1989**

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioner Marshall not participating; Commissioner Barrett issuing a statement.

1. This proceeding is part of a corporate takeover battle in which both parties hold numerous Commission licenses. McCaw Cellular Communications, Inc. ("McCaw"), through its wholly owned subsidiary, MMM Holdings, Inc. ("MMM Holdings"), seeks to acquire control by tender offer of LIN Broadcasting Corporation ("LIN"); LIN management opposes McCaw's efforts. McCaw filed the above-captioned applications to obtain Commission consent to the transfer of licenses for the cellular, paging, and television facilities owned by LIN. The applications were opposed by LIN, by BellSouth Corporation ("BellSouth"), and by a group of agents of the cellular licensee in Houston, Texas ("Houston Agents"),[1] who filed petitions to deny the applications or "Comments."[2]

2. On August 31, 1989, acting pursuant to delegated authority, the Common Carrier and Mass Media Bureaus found MMM Holdings fully qualified in all respects and that the public interest would be served by granting permission to consummate the transfer. Accordingly, the subject applications were granted and the petitions to deny were denied. *MMM Holdings, Inc.*, DA 89-1059, released August 31, 1989, *Erratum*, DA 89-1064, released September 1, 1989 (" *Bureaus Order* ").[3] On October 10, 1989, McCaw revised its tender offer, increasing its bid per share and decreasing the shares it would purchase from all shares to a majority of shares, thereby reducing the cost of the acquisition. On October 16, 1989, McCaw amended its applications to reflect the new financial arrangements.

3. LIN, BellSouth, and Houston Agents[4] have filed applications for review of the Bureaus' action, which are the subject of this Order.[5] The opposition pleadings of McCaw and reply pleadings of LIN and BellSouth, as well as all supplemental pleadings and pleadings responsive to the latest financial amendments, also are considered in rendering this decision.

4. In seeking review of the Bureaus' decision, LIN contends that the Bureaus exceeded the scope of their delegated authority and violated the Communications Act in failing to compare the service likely to be provided by McCaw, as projected by LIN, with that provided by LIN. In other pleadings in this proceeding, LIN asserted that the Bureaus should not have disposed of a case of such alleged magnitude on delegated authority. LIN also challenges the Bureaus' findings that McCaw has reasonable assurance of acquisition financing, and that the transaction would not permit excessive alien influence prohibited by statute, does not pose anticompetitive concerns, does not present a violation of the television/cable cross-interest restriction or the Commission's character qualifications standards, and that McCaw has not exhibited a disqualifying lack of candor in its dealings with the Commission in this proceeding.

5. The question of whether the Bureaus exceeded the scope of their delegated authority is rendered moot by this Order. The remaining issues presented are individually discussed below. With regard to several issues, LIN and BellSouth express an apparent misapprehension that the Commission applies a less stringent standard in analyzing an applicant's qualifications in takeover cases.[6] This Order should eliminate any such misunderstanding. In hostile takeover cases, in keeping with statutory principles and those of this Commission,[7] expedited treatment is provided, to the fullest extent possible consistent with the Commission's other duties, activities, and responsibilities.[8] To provide expedited treatment, the Commission brings to bear on the proceeding the resources that are appropriate and necessary to resolve matters in a timely manner. The transfer applicant and transaction, however, are subject to the same scrutiny and careful consideration as in any other transfer case before the Commission. On the basis of just such an examination the grant of the subject applications by the Bureaus is hereby affirmed. The Bureaus', and now the Commission's, disagreement with LIN's and the other petitioners' assessment of the merits of this case should not be mistaken for anything other than what it is -- the careful application of the same public interest standards and considerations relevant to all transfer applications.

**TRANSFEREE/TRANSFEROR COMPARISONS**

6. *Bureaus Order*. LIN had argued, in its petition to deny, that in determining whether to grant a transfer application, Section 310(d) of the Communications Act (47 U.S.C. §310(d)) compels the Commission to compare the transferee with the incumbent licensee, citing *Minneapolis Star & Tribune Co.* (" *Wichita - Hutchinson* "), 20 FCC2d 584 (1969). The Bureaus concluded that they were obliged to follow the reasoning and policies displayed in cases decided since *Wichita - Hutchinson*, and which were, in their determination, contrary to *Wichita - Hutchinson*. First, the Bureaus cited *CNCA Acquisition Corp.*, 3 FCC Rcd 6088 (1988), in which the Commission specifically stated that *Wichita - Hutchinson* had no bearing on common carrier transfer applications. Second, the Bureaus cited broadcast cases decided since and inconsistent with *Wichita - Hutchinson*.[9] The Bureaus then recounted the available relevant legislative history as further support for their conclusion. Finally, the Bureaus analyzed the practical impact of transferee/transferor comparisons to confirm the propriety of their determination that such

comparisons are neither required by statute or recent precedent nor appropriate as a matter of discretionary policy.[10]

7. *Application for Review.* LIN continues to argue, joined now by BellSouth, that *Wichita - Hutchinson* is a correct decision and that Section 310(d) of the Communications Act mandates a comparison of the public interest benefits of the transferee's and the transferor's ownership of the subject license(s) in transfer cases. They maintain that this analysis is required before the transfer of both cellular and broadcast licenses, challenging the comprehensiveness of the analysis in *CNCA Acquisition Corp., supra*, and the Bureaus' determination of its implications for this case. They also challenge the Bureaus' interpretation of the legislative history of Section 310 of the Communications Act, and LIN claims to be supported by the statement of the court of appeals in *WNCN Listeners Guild v. F. C. C.*, 620 F.2d 880 (D.C. Cir. 1979); *reversed sub nom. F. C. C. v. WNCN Listeners Guild, supra:* "Section 310(d) by its literal terms would not appear to forbid assignor-assignee comparisons because the license is not 'transfer[red], assign[ed] or dispose[d] of' when it is retained by the existing licensee." *Id.* at 857 n. 27. Finally, LIN argues that transferee/transferor comparisons would occur only in rare cases and, thus, would not have the negative policy consequence of frequent comparisons feared by the Bureaus.

8. *Resolution.* The principle enunciated in *Wichita - Hutchinson*, that the public interest determination mandated by Section 310(d) of the Act requires a comparison between the transferee and transferor and their prospective services, is not sustainable. The relevant portion of Section 310 reads:

> No construction permit or station license . . . shall be transferred, assigned or disposed of . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

47 U.S.C. §310(d). The Bureaus' reading of the statute and interpretation of legislative history in paragraph 8 of *Bureaus Order* is correct and the statute cannot be said to require transferee/transferor comparisons.[11] LIN introduces no new arguments not considered by the Bureaus in making their determination, except to cite dicta from *WNCN Listeners Guild v. F. C. C., supra*. Even that dicta, however, suggested only that transferee/transferor comparisons were permissible, not that they are required. Moreover, that case was reversed by the Supreme Court. *F. C. C. v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Thus, LIN's attempt to draw support for its position from the court of appeals' decision in the *WNCN Listeners Guild* case is inapt.

9. While LIN complains that the Bureaus' recitation of legislative history is composed of "snatches," those citations are the best evidence available that are representative of Congress' intentions.[12] Moreover, as the Bureaus correctly observed, a general policy of making such comparisons in transfer cases would severely restrict and delay the transferability of licenses, would penalize licensees who have provided exemplary service from making a legitimate transfer, and would serve to encourage licensees to diminish their level of service when anticipating sales of their facilities. (*Bureaus Order* at para. 9.) The Bureaus accurately recognized that several other cases are reflective of the Commission's position on this issue, *i.e.*, that transferee/transferor comparisons are inappropriate. (*Id.* at para. 7.) LIN discounts the significance or relevance of those cases, arguing that they represent the Commission's position only on its role in entertainment format change disputes. Nonetheless, these cases affirm the underlying principle that comparisons between transferees and transferors generally are inappropriate.[13] In any event, any doubt as to the Commission intentions regarding the broader application of that principle of noncomparison is erased by this decision. The Bureaus' determination on this issue is affirmed, and in order to avoid possible future confusion, any holding derived from *Wichita - Hutchinson, supra*, to the effect that the Commission must engage in a transferee/transferor comparison in considering a transfer application is hereby expressly overruled for the reasons set forth herein.

10. As correctly stated by the Bureaus, the public interest considerations for eschewing transferee/transferor comparisons, relied on above, apply as well to hostile takeover cases. (*See Bureaus Order* at para. 9.) LIN's argument that a hostile takeover presents significantly different circumstances than other transfer cases, warranting different considerations and conclusions, is not persuasive. The adverse consequence of penalizing positive performance would still occur. LIN repeatedly asserts that the negative consequence of retaining an unwilling owner by denying the transfer is not present where, as here, the transferor is willing, even eager, to retain the facilities. LIN's board of directors, which filed the pleadings opposing the subject transaction, do not necessarily reflect the views of the shareholders who own the company. If the owners of LIN's facilities (LIN shareholders) are in fact eager to retain them, as asserted by LIN, no sale to McCaw can occur. LIN's board has made a recommendation to stockholders, as is appropriate, regarding whether they believe the offer made by McCaw should be accepted. They also have actively and vigorously opposed the transaction in this and other legal and regulatory forums, as they claim is their fiduciary responsibility. But it is the stockholders themselves who are entitled to choose whether or not to sell their stock, however well- or ill-advised their decisions may be. The only aspect of "hostility" in a so-called "hostile" takeover is the unreceptiveness of the board to the offer. In claiming that a hostile takeover case is significantly different from any other transfer case in this respect, LIN has effectively proposed that the choice of whether to sell individual stockholders' interests should rest with management, rather than the stockholders.[14] This would result, obviously, in the same situation as sought to be avoided in non-hostile transfers, *i.e.*, owners would be required to keep facilities against their collective will, which neither serves the public interest nor is required by the Communications Act. Accordingly, LIN's proposal that hostile takeover cases should be analyzed differently than other transfer cases in assessing whether the public interest will be served by grant of the transfer applications is rejected.

### DEBT CONSIDERATIONS

11. *Bureaus Order*. When arguing that the Commission should compare the service to be provided by the transferee with that already provided by the transferor, LIN advanced as the primary point of comparison the significant reductions in broadcast and cellular service which would allegedly result if McCaw takes over the subject facilities, due to the debt incurred by McCaw in the takeover. The Bureaus determined, essentially, that the arguments and information advanced by LIN regarding McCaw's debt and its alleged effect on subsequent operations did not provide a basis for a comparison between whether the public interest would be better served by LIN or by McCaw. (*Bureaus Order* at para. 10.)

12. *Application for Review*. LIN and BellSouth essentially repeat the arguments made before the Bureaus regarding McCaw's ability to operate successfully the LIN facilities. They first reiterate LIN's previous assertions regarding the extent of debt that will be assumed by McCaw to consummate the takeover. LIN then refers to the previously submitted expert analysis which purports to demonstrate that operating income will fall short of debt service, and that no amount of cost-cutting and operational efficiencies can cut the resulting losses.[15] Taking direct issue with the Bureaus' decision, LIN argues that the Bureaus have unlawfully delegated to private investors the Commission's responsiblity to scrutinize the financial qualifications of applicants for facilities under its jurisdiction. It derives an "implicit" assumption from the Bureaus' position that any degree of Commission scrutiny of the views of the investment community is unnecessary, and charges that such assumption has been invalidated by numerous instances in recent years of overextension and bankruptcy by licensees, to the detriment of the public.

13. *Resolution*. While strict tranferee/transferor comparisons generally are not appropriate under Section 310(d) of the Communications Act, LIN and BellSouth are correct that the Commission must be able to determine that the public interest would be served by the grant of a transfer application. Such a finding must be made for all applications, and, contrary to BellSouth's contentions, the Bureaus did not analyze this issue under a more lenient standard than that used in mutual consent transfer cases. To the extent LIN's comparative qualifications contentions reflect on McCaw's basic qualifications and ability to operate in the public interest, they are relevant here. This was recognized by the Bureaus (*Bureaus Order* at para. 9), and an appropriate analysis was undertaken in the Bureaus' deliberations. Nothing advanced by LIN or BellSouth, however, provides "specific allegations of fact" sufficient to show that grant of the applications would be *prima facie* inconsistent with the public interest, convenience and necessity. Even assuming, *arguendo*, that a *prima facie* case has been advanced, in light of all the materials presented here there are no substantial and material questions of fact requiring a hearing. *See* 47 U.S.C. §309(d).

14. LIN's case is primarily built around its contentions as to the effects on McCaw's future operation of LIN facilities caused by the debt that McCaw will assume in taking over LIN. (That debt level has been significantly reduced by McCaw's most recent tender offer. *See* para. 19, *infra*.) The Commission should generally not become involved in reviewing corporate financing decisions, including the amount of debt the company will hold.[16] Specific arguments raised and facts advanced, of course, must be considered in each case. While this Commission is ultimately responsible for the public interest determination required to grant any application, it is cognizant that the marketplace has a natural tendency to provide reasonable evaluations of properties' future financial soundness, through the collective judgment of numerous investors. Investors, of course, sometimes might err in their predictions, even collectively. In this particular case, however, the projections offered by LIN that McCaw will be unable to service its debt from operations and will consequently cut back its service to the public are based on just such highly speculative hypotheses and projections that underlie the Commission's basic predilection not to second-guess these kinds of business judgments, especially where, as here, they must be ratified by a significant segment of the financial community.[17] The early stage of development of the cellular industry, which represents the lion's share of this transaction, casts further doubt on the reliability of LIN's predictions regarding the future financial status and resulting service of these companies. The particular cases cited by LIN, of recent troubles for some stations, have not been demonstrated to be any more reflective of excessive debt *per se*, than of excessive prices paid (not alleged here), poor management, or other factors. Consequently, while it may be possible in a particular case for a petitioner to present "specific allegations of fact" raising a *prima facie* public interest question regarding future debt levels of an applicant and the effects of that debt on future service to the public, LIN and BellSouth have not done so here. Rather, in this case, an attempt at resolution of "these speculative matters through adversary proceedings would be futile." *United States v. F. C. C.*, 652 F.2d 72, 93 (D.C. Cir. 1980) (*en banc*).

15. Even assuming *arguendo* that LIN's and BellSouth's arguments regarding the effects of McCaw's assumption of debt could constitute a *prima facie* case, these speculative allegations are outweighed in this case by McCaw's concrete record of service. The Commission has considerable knowledge of McCaw, which has grown from a small company to the largest cellular provider in the country, largely through debt- and equity-supported acquisitions. As relied on by the Bureaus, McCaw is a large, experienced, successful cellular operator which can be expected to undertake all necessary steps to provide high quality service to the public and remain a viable competitor. *Bureaus Order* at para. 26. Additionally, several different large, experienced, sophisticated lenders would be ratifying McCaw's determination as to the nature and level of its financing by investing substantial funds in McCaw. Thus, even if LIN's and BellSouth's arguments were acceptable as a basis for a *prima facie* case, when the available evidence on each side is weighed in whole, they have failed to raise a substantial question as to McCaw's continued ability to operate LIN's properties in the public interest after the proposed transaction.

### FINANCIAL QUALIFICATIONS

16. *Bureaus Order*. LIN had challenged the adequacy of the financial commitment letters upon which McCaw was relying to fund the proposed takeover, citing variations in the language of McCaw's letters from other letters of reasonable assurance relied on by the Commission in the past in approving other transfers of control. The Bureaus discounted the semantic variations, and found the letters

adequate to establish McCaw's financial qualifications to complete the proposed transaction. (*Bureaus Order* at paras. 24, 25.)

17. *Application for Review*. LIN initially argues that the Bureaus' determination that McCaw has established a reasonable assurance of acquisition financing of $3.0 billion in senior debt based on letters from Morgan Guaranty Trust Company ("Morgan Guaranty") is unsupported by the record and contrary to Commission precedent. It also argues that "junk bonds" financing from Drexel Burnham relied on in part by McCaw should not be considered by the Commission as a reliable source of financing, supplying several newpaper and magazine articles suggesting a downturn in the junk bond market. LIN no longer contests the availability of $1.0 billion from McCaw's sale of stock to British Telecom USA Holdings, Inc. ("British Telecom"). (*See* para. 24, *infra*.)

18. *Subsequent Proposed Transactions*. On October 3, 1989, McCaw announced that it had signed an agreement to purchase the interest of Metromedia Company in Cellular Telephone Company ("CTC"), the wireline cellular licensee in New York, New York, for $1.9 billion. Its purchase of the Metromedia interest is subject to LIN's current right of first refusal for that property. At the same time, McCaw announced that it would sell its cellular systems in Kentucky, Alabama, and Tennessee to Contel Cellular, Inc. for $1.3 billion.[18] LIN and BellSouth contend that the agreement to acquire the Metromedia interest in CTC raises questions as to whether McCaw continues to have a reasonable assurance of obtaining financing to acquire LIN. In conjunction with this argument, they contend that McCaw would be required to double its current debt.

19. *Modified Tender Offer*. On October 16, 1989, McCaw submitted an amendment reflecting revisions in its tender offer plans to acquire LIN.[19] McCaw has restructured its tender offer and reduced the cost of acquiring LIN from $5.5 billion to $2.9 billion, by seeking to obtain a majority of LIN's outstanding shares rather than all of its stock as previously planned. McCaw now proposes to purchase 22 million of LIN's outstanding shares at $125 per share, rather than all of LIN's outstanding shares at $110 per share. If successful, the revised tender offer would result in McCaw owning a total of approximately 52 percent of LIN's common shares on a fully diluted basis. McCaw no longer relies on the original letters from Morgan Guaranty, however, and also states that it does not believe it will be necessary to rely on the Drexel Burnham financing, for which it supplies an additional letter. Instead, to finance the revised tender offer, McCaw continues to rely on over $1.0 billion in cash from the recent sale of stock to British Telecom. McCaw is also now relying on a new credit facility to be established by Morgan Guaranty, Provident National Bank and the Toronto-Dominion Bank (collectively, the "Banks"), all of whom are agents for McCaw's existing credit facility, to provide $4.5 billion in financing that will be available for use in the LIN and Metromedia acquisitions. In support, McCaw submits a letter dated October 10, 1989 signed by all three banks verifying these representations.

20. *Additional Pleadings*. Neither LIN nor BellSouth has opposed McCaw's revised financial showing. BellSouth has argued, however, that in light of the "fundamentally restructured" tender offer and the "updated" financial showing, the Commission may not simply leave the staff's decision standing, but must act on McCaw's "current" tender offer, taking into account the proposed Metromedia purchase.[20] Similarly, prior to notice of McCaw's revised financial showing, LIN argued that the proposed Metromedia purchase must be considered in evaluating McCaw's financial showing and that such evaluation must relate to the "current context."[21]

21. *Resolution*. BellSouth and LIN are correct that McCaw's current financial showing must be evaluated. The financial showing made before the Bureau, and the challenges thereto in the applications for review are now moot.

22. To acquire cellular or television licenses, an applicant must demonstrate that it has a reasonable assurance that the necessary funds will be available. *See Multi - State Communications, Inc. v. F. C. C.*, 590 F.2d 1117, 1119 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).[22] The applicant is not required to establish binding legal certainty that the loan will be available, *Las Vegas Valley Broadcasting v. F. C. C.*, 589 F.2d 594, 599 (D.C. Cir. 1978), and the essence of reasonable assurance is "[a] present firm intention to make a loan, future conditions permitting . . . ." *Merrimack Valley Broadcasting, Inc.*, 82 FCC2d 166, 167 (1980). Under McCaw's revised tender offer to acquire LIN, it should require approximately $2.9 billion for that acquisition. McCaw has stated its reliance on $1.0 billion from the sale of stock to British Telecom, which is not challenged, and the $4.5 billion from a new credit facility established by Morgan Guaranty and the two other banks. The new credit facility has also not been challenged and is supported by the letter from the three banks. These sources of funding provide McCaw with reasonable assurance of more than adequate financing and McCaw is thus financially qualified.

23. Finally, LIN's and BellSouth's contentions regarding the effect of McCaw's acquisition of Metromedia's interest in CTC are not appropriate for consideration at this time. The financial viability of and public interest in McCaw's acquisition of Metromedia's interest in CTC is properly considered in the context of that application, which has not yet been filed, and may never be filed, as LIN enjoys a right of first refusal for that property. As for the relevance the Metromedia transaction does have, *i.e.*, how it might affect McCaw's financing for the subject LIN acquisition, McCaw has demonstrated that the institutions proposing to finance the takeover are aware of the Metromedia acquisition. Additionally, although not specifically required, it appears that McCaw has demonstrated that it has reasonable assurance of financing for both the LIN acquisition and the Metromedia transaction.[23]

## ALIEN INFLUENCE

24. *Bureaus Order*. Section 310(b) of the Communications Act provides that:

> No broadcast or common carrier . . . radio station license shall be granted to or held by . . . (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a

foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. §310(b). British Telecom, a non-U.S.-based company in which the British government holds a 48% interest through its parent, British Telecom plc, in turn owns just under 25% of McCaw's stock. LIN argued that this alien ownership interest and certain alleged "control" rights held by British Telecom in McCaw require a hearing to determine whether the public interest would be served by transferring the LIN television and cellular facilities, located in some of the country's largest markets, to an entity in which a foreign government has such a substantial interest and can exercise significant influence. The Bureaus found that the issue had already been settled when the Common Carrier Bureau specifically approved the British Telecom investment in McCaw, to which LIN now objects, in *McCaw Cellular Communications, Inc.* ("McCaw *Cellular* "), 4 FCC Rcd 3784 (Com. Car. Bur. 1989). They reviewed the case and confirmed that British Telecom's ownership is within the limit set by Section 310(b)(4) of the Communications Act, and that there was no new evidence presented that British Telecom would otherwise exercise impermissible influence over McCaw. The Bureaus stated that the analysis is not affected by the presence here of television licenses, or by the particular uses of the money invested by British Telecom, as urged by LIN. (*Bureaus Order* at paras. 32 - 34.)

25. *Application for Review*. LIN contends now that McCaw has yet to receive the Commission's imprimatur for the British Telecom investment, and continues that the Common Carrier Bureau's decision approving the investment (*McCaw Cellular, supra)* is not dispositive of the propriety of British Telecom's investment in McCaw as augmented by LIN's facilities. LIN contends that *McCaw Cellular*, relied on by the Bureaus, "differed from this case in three fundamental respects -- the statutory provisions, the issues, and the transactions involved" (Application for Review at pp. 19 - 20), but does not explain why or how.

26. *Resolution*. It is uncontroverted that the British Telecom investment in McCaw falls within the numerical limits of Section 310(b)(4) of the Communications Act. LIN's complaint, essentially that the Bureaus blindly relied oh the Common Carrier Bureau's earlier determination in *McCaw Cellular, supra*, is unavailing. The Bureaus not only cited *McCaw Cellular*, but also thoroughly reviewed the case and the present situation. LIN does not "specify with particularity . . . the factors which warrant Commission consideration."[24] If it intends to argue that the level of investment by British Telecom in McCaw which is permissible varies depending on whether or not McCaw also owns the LIN licenses, it does not sufficiently explain the rationale for such a position. As no basis for such a ruling has been advanced or appears to exist, the Bureaus' correct determination that no undue alien influence will result from this transaction is affirmed.

## COMPETITION

27. *Bureaus Order*. LIN and BellSouth had argued that the transaction should be prohibited because it would result in McCaw being a partner with BellSouth in Los Angeles and Houston, while competing with BellSouth in numerous other markets.[25] LIN and BellSouth variously contended that the direct exchange of contemporaneous market information between horizontal competitors can be anticompetitive, and more specifically, that McCaw would have an incentive to postpone introduction of new marketing, technological and other approaches in Los Angeles and Houston. The Bureaus observed that such situations as presented here between competitors/partners are not uncommon in the cellular industry, and that as a general proposition, special conditions should not be imposed as a matter of course, as they would stifle investment and innovation, and have not been shown to be necessary. The Bureaus accordingly declined to deny the applications, require a hearing, or impose a specific condition on the transferee. (*Bureaus Order* at paras. 41 - 43.)

28. *Application for Review*. LIN and BellSouth claim that the Bureaus dismissed their contentions regarding anticompetitive effects by inappropriately relying on the statement that, as a general proposition, the Commission does not impose Dallas-like conditions.[26] LIN argues that in light of the evidence presented showing that McCaw would be both a partner and a competitor with BellSouth in several markets, the Bureaus' failure to consider the specific facts of this case is contrary to the Commission's ruling in *James F. Rill*, 61 RR2d 1129, 1131 (1986). BellSouth also argues that the Bureaus misconstrued the Commission's decisions in the *James F. Rill* cases. According to BellSouth, in the first *James F. Rill* Order, the Commission's decision to impose Dallas-like conditions on Pacific was based on its finding that it was not in the public interest for Pacific and McCaw to hold equal partnership interests in the same market while at the same time competing in other markets, and also was based on the Department of Justice's recommendation to impose a similar condition on Pacific's participation in partnership activities in the Dallas-Ft. Worth cellular market. BellSouth argues that the Commission's decision to lift these conditions in the *James F. Rill* reconsideration Order was premised on a finding that Pacific's holdings in the San Francisco system increased from 47% to 62%, while McCaw's holdings in the partnership decreased from 47% to 31.7%. BellSouth concludes that in light of the factual similarities between the ownership interests of Pacific and McCaw in the original *James F. Rill* Order and the case at hand, where McCaw and BellSouth will be equal operating partners in some markets and competitors in other markets, the Bureaus' ruling on this point relying on the *James F. Rill* reconsideration Order is erroneous.

29. *Resolution*. LIN's and BellSouth's claim that the Bureaus dismissed their contentions regarding anticompetitive effects without considering the circumstances of this particular case is without merit. In this regard, the Bureaus concluded that LIN had not presented any facts to establish that the resulting partnerships between McCaw and BellSouth in Los Angeles and Houston would be *prima facie* inconsistent with current Commission policy. Moreover, as pointed out in *Bureaus Order*, the Department of Justice reviewed the proposed McCaw acquisition of LIN during the Hart-Scott-Rodino waiting period, which expired on June 24, 1989, without taking any action. With respect to BellSouth's concern that *Bureaus Order* misconstrued the decisions in the *James F. Rill* cases, although both cases took into account the percentage of ownership interests held by Pacific and McCaw, that information was not determinative in making the decisions in either case. In explaining the ratio-

nale for the elimination of the conditions initially imposed on Pacific, *Bureaus Order* indicated that the *James F. Rill* reconsideration Order found that the cellular industry had evolved to include numerous partnerships in which partners in one market are competitors in another market, obviating the need for Dallas-like conditions. *Bureaus Order* also pointed out that imposing conditions in all such situations could very well stifle innovation in this emerging field. Moreover, there are no indications of collusion between partners to the detriment of the public in markets where those partners are also competitors. (*Bureaus Order* at para. 42.)

30. In their decision, the Bureaus indicated that in accordance with precedent they would not deny this transfer application or impose conditions on the exchange of information between BellSouth and McCaw. As observed by the Bureaus, the cellular industry continues to have numerous partnerships where partners in one market are competitors in another market. Cellular radio is still an emerging technology, and the imposition of conditions could stifle technology and innovation, adversely affecting the development of this industry, which a decade of Commission policies have sought to promote. *Bureaus Order* pointed out that there is no indication of anticompetitive practices by partners in one market to the detriment of the public in markets where these partners are competitors. The Bureaus also noted that there is no indication of anticompetitive activity by partners to the detriment of the public in the markets served by the partnership. The Bureaus found that given the competition that a partnership faces within its own market, the allegations of possible anticompetitive conduct were "speculative at best." Accordingly, the Bureaus' finding that LIN failed to present facts sufficient to establish a *prima facie* case either that a grant would be inconsistent with the public interest due to anticompetitive situations or warranting inquiry into whether McCaw's proposed takeover of LIN would result in anticompetitive situations, is affirmed. It will be emphasized here, however, that any facts regarding anticompetitive conduct among partners who are also competitors in other markets will be evaluated if and when such specific allegations are brought to our attention, *e.g.*, in a Section 208 complaint proceeding or future transfer proceedings.

## TELEVISION/CABLE CROSS-INTEREST

31. *Bureaus Order*. John Malone presently sits on McCaw's board of directors. Malone also is president, chairman of the board and CEO of Tele-Communications, Inc. ("TCI"), a company with cable franchises which have an aggregate of 120,000 subscribers within the Grade B contours of LIN television stations. LIN had argued that Malone's interests violate the Cable Act[27] and the Commission's rules, which prohibit any one party from having an attributable interest in a cable system whose service area overlaps with the Grade B contour of a television station in which the same party also has an attributable interest. (47 U.S.C. §533; 47 C.F.R. §76.501.) McCaw had maintained that Malone's position as an "outside director" of the parent company (McCaw) of the subject television licensees would not involve the operations of the stations, and thus did not impute a cognizable interest in the stations to Malone for purposes of the Commission's ownership rules. Malone's position as a director of McCaw and the argument that his interest was not cognizable were explained in the Ownership Report that McCaw supplied to LIN for LIN's submission to the Commission.[28] LIN rejoined that Malone's apparent participation in the takeover efforts belied the contention that he was insulated from the stations. The Bureaus determined that McCaw should have provided a more detailed explanation of Malone's position and duties with McCaw, as directed in the Instructions to the Ownership Report (Instruction 5), and the *Bureaus Order* directed that such explanation be submitted prior to consummation of the transaction (*id.* at para. 46). The Bureaus also concluded that, in light of the disclosure of Malone's position that was provided in the McCaw Ownership Report, it was not unreasonable for McCaw to assume that its determination that Malone's interest in LIN's television stations was not cognizable was correct. The Bureaus ruled that no willful violation of Commission rules could be found under the circumstances to warrant any action other than directing McCaw to file the more detailed explanation specified in the Ownership Report Instructions prior to consummation. They determined that the Commission can take any necessary action based on that information, and no influence can be exerted in the meantime, given McCaw's outsider position in the interim and Malone's Bureaus-ordered recusal from any further participation in the takeover efforts. The Bureaus further concluded that it was reasonable for McCaw to assume that Malone's participation in the takeover proceedings would be permissible. The Bureaus did determine that the last assumption by McCaw, while reasonable, was incorrect, but that no willful violation occurred to merit any further action other than to prohibit Malone from further participation in the takeover efforts. (*Id.*)

32. *Application for Review*. Although LIN's argument seeking review is unclear, it appears to maintain that because the takeover contest itself "could have a direct impact on the television stations," (*id.*), more than a "technical violation" occured if Malone particpated in takeover activities.[29]

33. *Resolution*. The Bureaus' analysis is correct on every point, and LIN has advanced no basis upon which to reverse the Bureau's rulings. With respect to Malone's actual participation in takeover decisions regarding LIN, the Bureaus were correct in their determination that Malone's participation was not unreasonable and did not raise a substantial and material question of willful violation requiring disqualification. The Bureaus' corrective action, preventing further participation by Malone in takeover activities, was appropriate and sufficient and is affirmed, and McCaw is directed to submit, prior to consummation of the subject transaction, the information requested by the Bureaus.[30] The Bureaus were also correct that McCaw's failure to explain adequately Malone's position and the basis for its determination that his interest in LIN's television stations is not cognizable, did not raise a substantial and material question of willful violation requiring disqualification. Again, the Bureaus' corrective action, requiring a conforming submission by McCaw prior to consummation, was appropriate and sufficient and is affirmed. The Bureaus action will also remove the possibility of a future or continued violation of the television/cable cross-interest rules.

### CHARACTER QUALIFICATIONS/JOHN MALONE

34. *Bureaus Order*. As noted above, Malone not only sits on the board of McCaw as an outside director, but also is president, chairman of the board, and CEO of TCI. TCI's conduct in a franchise renewal proceeding in Jefferson City, Missouri, resulted in a multi-million dollar jury verdict against TCI for antitrust violations and tortious interference with business.[31] LIN had argued that because Malone is a director of McCaw, the Commission must determine his role, if any, in the conduct of TCI in the cable franchise renewal proceeding in Jefferson City. The Bureaus noted that the extent of Malone's knowledge or involvement in the TCI activities in question is currently under review by the Mass Media Bureau, in conjunction with another TCI application.[32] The Bureaus determined that because of the limitation of Malone's interest in McCaw and hence in the licensed facilities, no further action was currently warranted. (*Bureaus Order* at para. 48.)

35. *Application for Review*. LIN does not state the exact nature of its disagreement with the Bureaus' analysis, except to disagree with the conclusion, stating the obvious possibility that McCaw could complete the takeover prior to final resolution regarding Malone's character qualifications.

36. *Resolution*. LIN's observation that the transaction could be completed prior to resolution of the issue of Malone's character qualifications was shared by the Bureaus in their deliberations and is correct. Its conclusion that the public interest would be disserved thereby is not correct. *Bureaus Order* requires McCaw to demonstrate that Malone is insulated from participation in McCaw's activities with respect to the LIN broadcast stations or remove Malone from the McCaw Board. If Malone remains on the Board in an insulated position, it may be that his involvement in McCaw's activities with respect to the cellular stations will also be limited. Even if Malone remains involved with the cellular activities pending the outcome of the investigation into the Jefferson City case, his role as one outside director of McCaw does not raise substantial and material questions of fact regarding McCaw's qualifications to be a cellular license.[33] Accordingly, it is appropriate to await the results of the current investigation into the Jefferson City proceeding before taking any further action with respect to Malone's role in McCaw, as provided by the Bureaus, and it is emphasized that the Commission has full authority to take any appropriate action at that time.[34]

### CANDOR

37. *Bureaus Order*. LIN had argued that several representations made by McCaw during the course of this takeover attempt were incorrect or misleading, and cast doubt on McCaw's candor in its dealings with this Commission. The Bureaus examined each allegation by LIN, and all were found to be unsupported or immaterial, so that neither individually nor collectively did they raise a substantial and material question as to McCaw's candor.

38. *Application for Review*. LIN declares that it will not "repeat here the respects in which McCaw has exhibited a lack of candor in its dealings with the Commission." It specifically complains that the Bureaus' analysis was cursory, and advances the general charge that the Bureaus' refusal to designate a candor issue for hearing reflects a conviction that "all customary standards and policies should go out the window" in hostile takeover cases. LIN does not explain upon what basis the Bureaus' analysis or conclusions should be overturned.[35]

39. *Resolution*. The Bureaus' analysis of each candor allegation made by LIN, while concise, was not cursory, and each point was adequately discussed and disposed of. The decision would have been no different had this been an initial license application or a non-hostile assignment or transfer application. As LIN does not explain with particularity what errors it believes were made by the Bureaus, it provides no basis upon which to reverse the Bureaus on this issue, and it is sufficient simply to adopt and affirm the Bureaus' analysis and conclusions.

### STAY PENDING JUDICIAL REVIEW

40. Because LIN's application for review has been considered and denied on the merits, its motion for stay pending judicial appeal must be considered. There is a four-element standard by which to review requests for stay. *See, e.g., Storer Communications, Inc.*, 101 FCC2d 434 (1985); *Wisconsin Gas Co. v. F. E. R. C.*, 758 F.2d 669 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass' n v. F. P. C.*, 259 F.2d 921 (1958). LIN has not made the required showing, but there is no need to discuss the basis for that conclusion. McCaw has stated that, before October 27, 1989 (the expiration date of its current offer), it will give five business days notice to all parties before consummating the tender offer. To date, no such notice has been given. Thus, LIN will have sufficient time to seek a judicial stay if it wishes.[36] Accordingly, based on McCaw's representation that it will not consummate the proposed transaction with less than five days' notice prior to October 27, 1987, LIN's and BellSouth's requests for a stay pending judicial review are denied.

41. Accordingly, IT IS ORDERED, That the Applications for Review of the action by the Mass Media and Common Carrier Bureaus in *MMM Holdings, Inc.*, DA 89-1059, August 31, 1989, *Erratum*, DA 89-1064, September 1, 1989, filed by LIN Broadcasting Corporation, by BellSouth Corporation, by Houston Agents, and by Donald A. Pels and Thos. H. Law ARE DENIED, and the Bureaus' action in *MMM Holdings, Inc., supra*, granting the above-captioned applications for the transfer of control of LIN Broadcasting Corporation to MMM Holdings for McCaw Cellular Communications, Inc., subject to the condition specified in paragraph 52 of the *Bureaus Order*, IS AFFIRMED.

42. IT IS FURTHER ORDERED, That the Contingent Motions for Stay Pending Judicial Review, filed by LIN and by Pels and Law, ARE DENIED.

43. IT IS FURTHER ORDERED, That the Motions for Stay Pending Commission's Review and Requests to Convene a Board of Commissioners, filed by LIN and by Pels and Law, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] Cellular Marketing, Inc., Lawrence Communications, Inc., Mobius Electronics, and W. Roy Bronson are independent agents of Houston Cellular Telephone Company ("Houston Cellular"), one of the LIN subsidiaries which is an object of the subject transaction. These parties oppose only the transfer of the license for the Houston facilities held by Houston Cellular.

[2] Donald A. Pels and Thos. H. Law also opposed McCaw's applications, and filed a petition to deny. Pels is chairman, president and CEO of LIN and Law is a director and stockholder of LIN, and they merely incorporated LIN's pleadings throughout the proceeding. They were not separately acknowledged in the *Bureaus Order*, *infra*, but their pleadings were effectively disposed of. Pels and Law have now incorporated in full by reference LIN's application for review. Neither Pels and Law nor their pleadings will be separately referred to hereafter.

[3] Two sets of applications had been filed for McCaw's acquisition of LIN's properties; the first for transfer to a trustee for McCaw under a special temporary authority ("STA"), the second for transfer from the trustee to MMM Holdings for McCaw. The Bureaus constructively amended the applications to provide for the transfer directly to MMM Holdings, and dismissed the STA request applications.

[4] The Houston Agents' application for review merely incorporates in full the application for review filed by LIN. Neither the Houston Agents nor their pleading will be separately referred to hereafter.

[5] LIN has also filed a Motion for Stay Pending Commission Action, a Request to Convene a Board of Commissioners, a Motion for En Banc Consideration, and a Contingent Motion for Stay Pending Judicial Review. BellSouth has also requested a stay in its latest pleading concerning the effects of the change in McCaw's tender offer, arguing that the Bureaus' grant was based on premises no longer extant, given the changes in McCaw's tender offer and other acquisition plans. All but the Contingent Motion for Stay Pending Judicial Review which is treated at paragraph 40, *infra*, are rendered moot by the decision.

[6] *E.g.*, "[ *Bureaus Order* ] apparently reflects the conviction that the Commission should play virtually no role in a hostile takeover -- that all customary standards and policies should go out the window." LIN Application for Review at 22. "This is just one example of [ *Bureaus Order* ]'s evisceration of all public interest considerations in the name of strict neutrality in hostile takeovers." *Id.* at 21. "[ *Bureaus Order* ] elevated the 'neutrality policy' to a nearly irrebuttable presumption that the public interest will be served by allowing stockholders to tender their shares to [sic] hostile takeover company." BellSouth Application for Review at 2. "The [ *Bureaus Order* ]'s implicit concentration on only one public interest factor -- stockholder choice -- makes it highly suspect . . . ." BellSouth Application for Review at 6.

[7] *See Tender Offers and Proxy Contests ("Tender Offers Policy")*, 59 RR2d 1536, 1539 - 40, 1552 - 57 (1986), *appeal dismissed sub nom. Office of Communication of The United Church of Christ v. F. C. C.*, 826 F.2d 101 (D.C. Cir. 1987).

[8] This effort includes, in cases where requested and appropriate, provision for the transfer of contested licenses to a caretaker trustee for the hostile bidder on a special temporary authorization. *Tender Offers Policy*, *supra*.

[9] The Bureaus cited *Policy Statement re: Changes in the Entertainment Formats of Broadcast Stations*, 60 FCC2d 858 (1976), *F. C. C. v. WNCN Listeners Guild*, 450 U.S. 582 (1981) and *Tender Offers Policy*, *supra*.

[10] The Bureaus went on to determine that even if facts indicating that the public interest would be better served by LIN than by McCaw could require a comparison between LIN and McCaw, LIN did not supply a sufficient basis for such comparison. *Bureaus Order* at para. 10. *See* paras. 13 - 15, *infra*.

[11] It is not necessary to address here whether Section 310(d) altogether prohibits transferee/transferor comparisons.

[12] LIN advances only one other citation to legislative history which purportedly controverts the Bureaus' claim of support in the legislative history of the 1952 amendments. That passage indicated that Section 310(d) was amended in 1952 specifically to eliminate the "AVCO" procedure, which had provided for the Commission in transfer cases to consider the relative merits of the proposed transferee "and anyone else who indicated a desire to obtain the facilities." 98 Cong. Rec. 7394 (1952) (remarks of Congressman Harris, floor leader of the legislation in the House). LIN also refers to S. Rep. No. 741, 81st Cong., 1st Sess. 11 (1949), which says essentially the same thing. These passages, however, do not purport to establish that elimination of the AVCO procedure was the only purpose or effect of the amendment, and thus does not advance LIN's argument.

[13] This principle is further supported by a court of appeals' interpretation of the effect of the 1952 amendments to Section 310: "Thus, where permission is sought to assign a valid existing permit, the only question is whether the proposed assignee possesses the minimum qualifications consistent with the 'public interest, convenience and necessity.'" *MG - TV Broadcasting Company v. F. C. C.*, 408 F.2d 1257, 1264 (D.C. Cir. 1968).

[14] The court in a New York case stated the situation well. When Seagram sought to take over Conoco, and Conoco managment resisted and insisted it should be given time to effectuate a transaction with a "white knight" (Du Pont), the court stated:

> [Conoco's argument] is simply another way of the Directors of Conoco pressing their view that the Du Pont proposal in their judgment is more favorable to the stockholders than the Seagram offer and renewing their previously stated hostility to that offer . . . . To be sure, the Board of Directors are under a duty to exercise their best business judgment with respect to any proposal pertaining to corporate affairs, including tender offers; they may know what is best for the corporation, but their judgment is not conclusive upon the shareholders . . . . What is sometimes lost sight of in these tender offer controversies is that the shareholders, not the directors, have the right of franchise with respect to the shares owned by them. [citation omitted] . . . The Directors, however, by this application to restrain the Seagram offer, seek to limit the stockholders to a single choice -- the Du Pont offer. The decision whether to accept one or the other, or even to reject both, rests with the stockholders and not the Board.

*Conoco, Inc. v. Seagram Company Ltd.*, 517 F.Supp. 1299, 1303 (S.D.N.Y. 1981).

[15] LIN also reiterates its argument that McCaw concedes the financially unsound nature of its takeover plan in a filing with the Securities and Exchange Commission ("SEC"). That argument was rejected by the Bureaus (*Bureaus Order* at para. 19 n. 16), and LIN does not advance a basis upon which to overturn the Bureaus' analysis. Accordingly, this argument merits no further consideration. Nonetheless, it will be noted here that risk factor analyses in stock prospectuses, which intentionally provide worst-case financial projections, are not admissions that

such worst-case scenarios will develop. If the Commission were to hold hearings on any applicant that indicated to its potential shareholders that there are risks of financial difficulty over time, even though it complies with the Commission's financial qualifications requirements, the Commission repeatedly would become embroiled in inquiries over speculative questions far beyond the scope of its public interest obligations under the Communications Act and as developed in Commission case law.

[16] The separate issue of whether McCaw can meet the Commission's financial qualifications requirements and finance the transaction is discussed in the next section.

[17] Symptomatic of the unpersuasiveness of LIN's case is a report of Frazier, Gross & Kadlec, Inc. entitled "Cash Flow Projections for LIN Broadcasting Corporation" (LIN Petition to Deny, App. D.), heavily relied on by LIN, and now BellSouth. The projections are based on critical assumptions that are inherently speculative and fail to include the wide range of future possibilities. For example, because the authors assume that LIN's broadcasting stations are "unarguably already lean, efficiently run operations" and its cellular facilities have achieved "operating excellence" (App. D. at 5, 15), its projections include only scenarios under which the LIN facilities are run the same way as they presently are or with substantial service cutbacks. The projections do not consider at all the possibility of improvement in the operation of LIN; the "status quo" is assumed to be the best possible scenario. Other assumptions similarly limiting the validity of the projections permeate the report. For instance, they fail to consider possible results of reconfiguring the organization of operations, including possible additional acquisitions or divestments. In fact, exactly that has happened, and may again happen. McCaw's debt requirements have been significantly reduced by the recent restructuring of its tender offer, and its cellular operations may well undergo significant restructuring with acquisitions and/or divestments, plans for each of which have recently been announced. *See* paras. 18, 19, *infra*.

[18] *See* letter to Ms. Donna R. Searcy, Secretary, FCC, from R. Michael Senkowski, Esq. (counsel for McCaw), October 3, 1989. On October 5, 1989, McCaw filed *pro forma* applications to restructure McCaw in anticipation of the sale of its Alabama, Kentucky, and Tennessee cellular interests to Contel. (File Nos. 04144-CL-TC-1-90 et al.) McCaw indicates that the long-form transfer of control appliations will be filed in the near future.

[19] On October 10, 1989, McCaw indicated that it would be submitting such an amendment and provided a draft of its new bank letter. *See* McCaw response to BellSouth and LIN supplemental pleadings.

[20] *See* Reply of BellSouth Corporation and BellSouth Enterprises, Inc. to McCaw Response to BellSouth and LIN Supplemental Pleadings (October 13, 1989).

[21] *See* LIN Supplemental Pleading (October 5, 1989).

[22] The basic reasonable assurance standard for financing transfers of control is the same for both broadcasting and cellular common carriers, although the filing procedures are different. *See* Sections 22.917, 73.4099, 73.4100, and 73.4101 of the Commission's Rules. (47 C.F.R. §§22.917, 73.4099, 73.4100, 73.4101.)

[23] The LIN and Metromedia acquisitions would together require $4.8 billion ($2.9 billion for LIN and $1.9 billion for Metromedia's interest in CTC). McCaw has a reasonable assurance of $5.5 billion, which surpasses the financing requirements of both transactions. This is without considering the alleged availability of another $1.5 billion in debt from the banks, and another $2.5 billion from equity placements by Drexel Burnham. Moreover, McCaw should have available an additional $1.3 billion from its sale of some of its systems to Contel, either for use in its acquisitions or for later reduction of debt assumed in its acquisitions.

[24] 47 C.F.R. §1.115(b)(2).

[25] LIN had also argued that the British Telecom/McCaw purchase agreement was anticompetitive. That issue was resolved in McCaw's favor by the Bureaus (*Bureaus Order* at para. 40), and is no longer pressed by LIN.

[26] In *James F. Rill*, 60 RR2d 583, 598 (1986), the Commission granted transfer of control applications authorizing Pacific Telesis (Pacific) to acquire Communications Industries, Inc., subject to a condition limiting the exchange of information between Pacific and its competitors in those markets where Pacific would be a partner with someone who is a competitor in another market. This condition later become know as a "Dallas-like" condition. However, on reconsideration, the Commission eliminated this condition. *James F. Rill*, 61 RR2d 1129, 1131 (1986).

[27] The Cable Communications Policy Act of 1984, Public Law 98-549, 98 Stat. 2780, October 30, 1984. 47 U.S.C. §§521 - 559.

[28] The Commission's rules require a separate ownership report to be filed for any entity that owns an attributable interest (generally 5% or more of the voting stock) in a company that is required to file a report. 47 C.F.R. §73.3615(iv)(B). At the time, McCaw held a little more that 5% of the outstanding LIN stock, and LIN requested an Ownership Report from McCaw.

[29] In a footnote, LIN claims that the Bureaus cited no "precedent" for their determination that a recusal statement may be unnecessary, depending on the description of Malone's duties and responsibilites. The Bureaus did cite the explicit directions of Instruction 5 of the Ownership Report and Note 2(h) to Section 76.501 of the Commission's rules (47 C.F.R. §76.501). LIN does not more directly question the correctness of the Bureaus' action in this regard, perhaps aware that the Bureaus are fully supported not only by Instruction 5 to the Ownership Report and by Notes 2(h) to Sections 73.3555 and 76.501 of the Commission's rules (47 C.F.R. §§73.3555, 76.501), but also explicitly by the precedent of the Order adopting the attribution rules, *Report and Order* in Docket No. 20521, 97 FCC2d 997, 1025-26 (1984):

> Under this provision [for the exemption from attribution of officers and directors of parent companies], eligible officers and directors will be accorded exemption from attribution upon submission by the licensee, in conjunction with its ownership report or in conjunction with a relevant application, of the individual's name, his full title, and a description of his duties and responsibilities, along with an explanation of why that person should not be attributed with an interest.

(*Recon in part, Memorandum Opinion and Order* in Docket No. 20521, 58 RR2d 604 (1985); *further recon., Memorandum Opinion and Order* in Docket No. 20521, 1 FCC Rcd 802 (1986).) There is no mention in that Order, or in any source, of a requirement for a separate recusal statement from the officer or director of the parent of a licensee corporation who is effectively insulated from the licensee and its operation by virtue of his position in the corporate structure. Such a statement will be required here only if necessary, *i.e.*, if the corporate structure itself does not effectively insulate Malone from the television stations. (*See Bureaus Order* at para. 52.)

[30] While of no continuing relevance here, it is useful to point out to McCaw its apparent misunderstanding of the Bureaus' ruling. The Bureaus ruled that it was not unreasonable for

McCaw and Malone to presume that his participation in takeover activities was permissible; the Bureaus did not conclude, as presented by McCaw at page 21 of its opposition pleading, that Malone's participation in McCaw's decision to launch the takeover bid did not place him in a position to exert any present influence on LIN's stations.

[31] *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo. 1985); *aff'd* , 800 F.2d 711 (8th Cir. 1986); *cert. denied*, 480 U.S. 910 (1987).

[32] TEMPO Satellite, Inc., a wholly owned subsidiary of TCI, is an applicant for an authorization in the Direct Broadcast Satellite ("DBS") service. *Continental Satellite Corporation*, FCC 89-257, released August 15, 1989. On August 2, 1989, a letter was sent by the Mass Media Bureau to TEMPO requesting information regarding the facts and circumstances surrounding the Jefferson City case.

[33] Because radio common carriers "are not responsible for message content," character considerations, while relevant, do not carry the same crucial significance as in broadcast proceedings. *Arizona Mobile Telephone Co.*, 93 FCC 2d 1148, 1153 (1983).

[34] This situation differs from that in which action on a pending application was delayed until completion of the referenced investigation. *Continental Satellite Corp., supra.* In that case, the applicant in question was a wholly owned subsidiary of the parent company at fault in the Jefferson City proceeding. In this case, the applicant itself is unrelated in any way to either the parent or subsidiary company involved in the misconduct in Jefferson City. Only one person from the parent of the transgressing company, who himself may or may not have been involved in the Jefferson City misconduct, is involved here, and only as an outside director among numerous directors of the parent company.

[35] In a footnote, LIN takes issue with the Bureaus' treatment of the network affiliation agreement issue. The Bureaus had found that McCaw was not obliged specifically to inform them by amendment of the potential loss of network affiliation agreements, as that is standard contractual practice, and would not be inconsistent with McCaw's application statement that it intended to continue in effect LIN's programming policies and practices. (*Bureaus Order* at para. 50.) LIN here states that cancellation of these agreements would adversely affect the stations' ability to serve the public, and that there were specific letters written to McCaw by the networks, as opposed to a mere contractual provision at issue. In *Bureaus Order*, the Bureaus responded to the candor allegation as framed there by LIN; these modifications in LIN's argument do not undercut the Bureaus' analysis. The existence of letters does not alter the routine nature of the contractual situation, and the precise way in which the stations could possibly be affected does not bear on McCaw's candor in this matter. LIN overemphasizes the significance of the letters to argue that they are so material as to require notification to the Commission. Networks generally reserve the right to cancel affiliation contracts when stations are sold. They are generally reestablished with the new owners, and LIN has not indicated that should not be expected here. In fact, in this case, the CBS letter to McCaw specifically invites discussion to establish a new affiliation agreement with McCaw. In the few cases where contracts are not renewed, the network affiliations are usually realigned among the stations within the market, as the networks have every incentive to maximize the exposure of their programs, so that the public is not significantly affected.

[36] In some past hostile tender offer cases involving the special STA procedures adopted in *Tender Offers Policy, supra*, the effective date of the Commission's action was stayed upon the filing of a motion for judicial stay, until such time as the court would act on the stay motion before it. On reflection, it appears more appropriate to treat such stay requests, in all hostile takeover cases, in the same manner as those arising in other contexts. That is, upon an appropriate showing, action may be stayed a few days to permit the filing of a judicial stay, but not to await judicial action indefinitely. This is in keeping with the decision in *J B Acquisition Corp.*, 60 RR2d 1207, 1213 (1986), in which a specific and brief period was granted to seek and receive court intervention. In that regard, it is notable that the court acts promptly on stay motions arising in all contexts, and can issue a preliminary stay if it so elects. In fact, in *J B Acquisition Corp.*, the court denied the stay request two days after the Commission acted.

## CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re: Applications of MMM Holdings, Inc. for Transfer of Control of LIN Broadcasting

At the outset, I am pleased that the Commission did not employ its short form "trustee" procedure in this case. My criticism of the short form trustee process is well known. [1] It is sufficient to note that through an expedited long form evaluation, the Commission was able to meet its statutory obligations without unduly obstructing the takeover process. Neutrality in these proceedings is important, but it should not be accomplished at the expense of ignoring our statutory obligations or employing procedures that have no basis in the Communications Act. *See Office of Communications United Church of Christ* 826 F.2d 101 at 113, n.6 (D.C. Cir. 1987) (Wald, J., dissenting). The majority's decision is a step in the right direction, providing an excellent example of why the trustee process is unnecessary. Indeed, evidence presented in this proceeding demonstrates that the time required to complete most hostile tender offers is longer than the time necessary to process long form applications. *See LIN Motion to Dismiss and Opposition*, Appendix A, June 27, 1989 at 32-33.

While the majority employed the correct legal process, there are several aspects of the decision that cause me to concur. I believe this is a very close case, deserving attention of the full Commission. [2]

I write separately to express my views regarding the amount of debt originally anticipated in this transaction. As I have observed on previous occasions, an excessive debt burden creates economic conditions that may impair a licensee's ability to meet its public interest obligations. *See Antitrafficking of Broadcast Licenses: Hearings on H. R. 1187 before the Subcomm. on Telecommunications and Finance of the House Committee on Commerce*, 100th Cong. 1st Sess. 45-48 (1987) (Quello, Comm'r., statement). This issue is raised in the case before us. Of course, the properties involved are primarily cellular telephones. Nevertheless, I believe concern with excessive debt financing is appropriate. My concern is merely heightened because of the broadcast properties involved in this transaction.

As a general principle, I believe the Commission should take into account excessive levels of debt in fulfilling its statutory obligation under Section 310(d) of the Act. The crucial question, however, is the proper method of evaluating such debt.

I tend to agree that conducting a comparison between the transferee and transferor would be counter productive. I reach this conclusion on policy grounds. The majority observes correctly that the statute does not *mandate* such a comparison. I disagree with the Bureaus' suggestion, however, that the statute may preclude such an inquiry. Nevertheless, I am persuaded that, generally, potential impairment to the alienability of licenses from pursuing a comparative approach outweighs any benefit that may flow from routinely conducting hearings on these matters. Accordingly, I disagree with what appears to be the majority's blanket elimination of the *Wichita - Hutchinson* doctrine. [3]

I would limit my analysis to the facts of the instant case. In my view, the revised tender offer significantly alters the equation. The cost of acquiring LIN has been reduced from $5.5 to $2.9 billion. Accordingly, the amount of debt that would have been incurred is reduced. In this regard, it appears that McCaw need not rely on junk bond financing. Because of this revision, I see no need to designate the issue for hearing. We have had experience with McCaw as a licensee. We are not dealing with an unknown entity.

I am uneasy, however, about the Bureaus' and, to a lesser extent, the majority's apparent willingness to defer to the financial community for determinations of whether the debt structure of a licensee will impair its ability to meet the obligations under the Communications Act. The Commission, not Wall Street, is in a better position to conduct the necessary public interest evaluation. While difficult, the Commission should not shy away from such a task in appropriate cases. However, the revised tender offer obviates the need for such an inquiry.

In my opinion, excessive debt also should be relevant to a licensee's basic qualifications. In this regard, the Commission should not engage in a comparative analysis, but rather focus on the ability of the transferee to service its debt. To date, the Commission has not established guidelines to govern such an inquiry. Indeed, an examination of a company's debt structure is not a part of the Commission's initial analysis governing financial qualifications. Because we have no clear guidelines in this area, I believe it would be inappropriate to designate on this issue. Moreover, the revised offer attenuates my concerns with McCaw's debt service.

On balance, the tender offer as presently structured removes my concerns regarding the excessive debt in this transaction. I see no need for a hearing. As a general matter, however, the Commission should take a long hard look at is present policies and the debt mounting in its regulated industries. I would welcome the initiation of a general proceeding on this issue.

My overriding concern is that the Commission not delegate its public interest oversight responsibilities to the financial evaluations of Wall Street. I do not believe this is the situation in the case before us. Unfortunately, the Bureaus' decision and the majority's analysis can be construed to give too much deference to the financial analysts of Wall Street. Accordingly, I shall concur in the result.

## FOOTNOTES FOR STATEMENT

[1] *See Community for Full Value of Storer Communications, Inc.*, 57 RR.2d 1651, 1673 (1985) (Quello, Comm'r., dissenting in part and concurring in part); *One Two Corporation*, 58 RR.2d 924, 937 (1985) (Quello, Comm'r., dissenting); *Policy Statement: Tender Offers and Proxy Contests*, 59 RR.2d 1584 (1986) (Quello, Comm'r., dissenting); *McFadden Acquisition Corporation*, 104 FCC.2d 545, 570 (1986) (Quello, Comm'r., dissenting in part); *CNCA Acquisition Corp.*, 3 FCC Rcd 6088 (1988) (Quello, Comm'r., dissenting).

[2] In my view, the Bureaus lacked the authority to approve the transfer on delegated authority. I simply disagree with the *Tribune Co.*, 20 FCC.2d 584 (1969) (Wichita-Hutchinson) was not good law at the time the Bureau reached its decision. It is fair to state that the continued validity of the *Wichita - Hutchinson* doctrine, as applied to the broadcast facilities, had not been addressed *directly* by the Commission. The Commission's decision in this proceeding proves that there was uncertainty regarding the legal force of the doctrine. Because the issue had not been squarely addressed by past decisions it could not have been resolved under outstanding precedents and guidelines. *See* 47 C.F.R. Sections 0.283(a)(14)(ii); 0.291(a) (1989). The Bureaus simply lacked the authority to expressly overule a doctrine established by the full Commission. The Bureau's actions are especially disturbing given the sensitive nature of hostile tender offers and the impact such a decision may have on the takeover process.

[3] I do not believe that the hostile nature of the transfer should automatically trigger the need for a hearing pursuant to *Wichita- Hutchinson*. While we should give great weight to incumbent management regarding questions of corporate control, *see Committee for Full Value of Storer Communications Inc.*, 57 RR.2d 1651, 1670 (1985) (Quello, Comm'r., dissenting in part), the majority observe correctly that it is ultimately the shareholders who determine whether the company is sold. Moverover, even if we designated .this case for hearing, it is obvious that the incumbent management desires to merge its cellular facilities with BellSouth. Thus, I am not confronted with a situation where corporate management has expressed a desire to continue operating all of its facilities on an independent basis. On these facts, I see no relevant difference between the hostile takeover and a nonhostile transfer to a third party.

## SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: In re Applications of MMM Holdings, Inc. for Transfer of Control of Lin Broadcasting Corporation

The Commission's decision stays the course started when it adopted the *Tender Offers Policy Statement.* [1] Under this policy, the Commission maintains its policy of "strict neutrality" and therefore does not unduly interfere in the marketplace for corporate control of communications licenses. The Commission through this *Memorandum Opinion and Order* [2] indicates that it will provide the same level of public interest scrutiny to hostile takeover cases as is applied to any other transfer case before the Commission. Moreover, the Commission expressly overrules the former policy of comparing transferees and transferors. I agree with this policy direction. I write separately to voice my concern that in transactions of this nature the parties not so overburden themselves with debt that they no longer can provide adequate service to the

public. I also have concerns about the effect on competition of allowing companies that are competitors in some markets to be partners in others.

On the issue of debt, I believe the Commission has an obligation under Section 310(d) of the Communications Act (47 U.S.C. 310(d)) to examine proposed acquisitions to ensure that the public interest is served. Specifically, I am concerned that parties in future transactions not interpret this decision to overrule the transferee/transferor comparison in *Minneapolis Star & Tribune Co.* (" *Wichita-Hutchinson* "), 20 FCC 2d 584 (1969) as a means of avoiding Commission scrutiny of the effect of debt on financial qualifications. Although the revised tender offer obviates the need to review the impact of "excessive debt" on McCaw's ability to acquire control over LIN, [3] I want to make it clear that, in this decision, the Commission retains its authority under its rules [4] to examine financial issues raised by a review of transfer of control applications or identified in petitions filed against such applications. The Commission conducts this investigation to ensure that the financial condition of a proposed transferee will not result in a *foreseeable* disruption of service to the public. While the Commission may generally defer to the judgment of financial analysts to determine the viability of a particular acquisition, it does not abdicate its "public interest" responsibility to review a transferee's financial qualifications independent of their analysis. Where a transferee's financial health is in issue, the Commission should review the merits of each allegation very closely. Thus, although I agree with the results in the case, I wish to emphasize that the Commission will continue to examine a transferee's financial qualifications when deciding whether a proposed transfer is in the public interest.

Finally, I am somewhat concerned about the effect this transfer will have on competition. The acquisition of Lin by McCaw will result in a partnership between McCaw and BellSouth in some markets although they are competitors in others.

The evolving cellular industry has taken great strides forward in technological development and innovation. This Commission has developed policies favoring that technological growth and expansion of this service. The entire nation has reaped the benefits of those policies as cellular radio has become an efficient and new source of telecommunications. Past Commission practice has permitted competitors in some cellular markets to be partners in others. I therefore believe that the public interest would not be served, at this time, by the imposition of conditions on transfer applications that could thwart the progress of cellular radio throughout the nation.

Although many cellular markets are presently served by partners that are competitors in other markets, the Commission has not found that this necessarily leads to anticompetitive practices in either market. Moreover, in the absence of record evidence that a grant of the transfer applicaiton will result in anticompetitive practices by McCaw and in the absence of action by the United States Department of Justice, I do not believe that denial of the application or the imposition of conditions on this transfer is warranted. I also note that the Commission's *Order* retains our ability to revisit the issue and to take appropriate action should such anticompetitive activity occur. Accordingly, I cannot conclude that a grant of these applications would be contrary to the public interest.

**FOOTNOTES FOR STATEMENT**

[1] *Tender Offers and Proxy Contests*, 59 RR 2d 1536 (1986), *appeal dismissed sub nom. Office of Communications of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987).

[2] *MMM Holdings, Inc.*, FCC 89-300, adopted October 25, 1989.

[3] I am not sure that I would have rendered the same decision on this issue absent the change in financial conditions.

[4] *See* 47 C.F.R. Sections 22.917, 73.4099, 73.4100, 73.4101 (1988).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**September 29, 1989**

**LETTER**

**Released: November 29, 1989**

**C10-528**

Mr. Pegram Harrison
President, Maycourt Company
P.O. Box 12890
Lexington, KY 40583

Re: Applications for Renewal
of License of Stations
WBBE (AM)/WMGB-FM,
Georgetown, KY

Dear Mr. Harrison:

This refers to your pending applications for renewal of the licenses of stations WBBE (AM) and WMGB-FM, Georgetown, Kentucky and constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE against the Maycourt Company. Pursuant to Section 503 of the Communications Act, 47 U.S.C. Section 503, and Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, you are hereby advised of the following.

The Kentucky State Conference of Branches of the NAACP, its branches operating in your service area, and the National Black Media Coalition filed a petition to deny your application on July 3, 1989. By letter dated August 2, 1989, the petitioners moved to withdraw the petition and requested that the Commission renew your licenses. Nonetheless, it is our practice in all cases to review the stations' equal employment opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. Section 309. Review of the EEO record of WBBE (AM) and WMGB-FM for the license term reflects a failure to comply with the Commission's EEO rule.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified minorities and women are not regularly present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee.

When a renewal application indicates an adequate record of EEO efforts, the application is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission may designate the renewal application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987).

Our review of your renewal application and your response to our inquiry shows no evidence of discrimination but does reveal an inadequate record of EEO efforts. It appears that you did not contact minority recruitment sources when vacancies occurred and that you did not include minorities in the applicant pool. By letter dated July 25, 1989, we requested additional information regarding your EEO efforts at WBBE/WMGB-FM. Your response indicates that from the time the Maycourt Corporation acquired the stations in 1986 through the end of the license term, you had at least 53 hiring opportunities, 50 of them for upper-level positions. The only Black hired for a full-time position during the time you have operated the stations was a sales worker referred by an advertisement in a local newspaper who remained at the stations for only six weeks in 1987.[1] You do not list the referral source for each employee hired, nor do you provide information regarding the number, race, and gender of the interviewees for each position.

Moreover, it does not appear that you undertook a meaningful self-evaluation of your EEO program as required by the Commission's EEO rule. Your 1989 EEO Program Report (FCC Form 396) lists as recruitment sources the Lexington Herald-Leader, the Georgetown Graphic, the University of Kentucky, Georgetown College, the Lexington Urban League, the Mayor's Office of Employment and Training, the Kentucky Department of Employment Services, and the Bluegrass Community Action Agency.[2] Your response to our inquiry states that you sent out a "mass mailing" which did not list specific job openings three times in 1988 to the above sources, as well as to the Scott County Planning Center, Translyvania University, and the mayors of Stamping Ground, Kentucky and Georgetown, Kentucky. No minority referrals resulted from these mailings. [3]

Your 1989 EEO Program Report also states that during the 1989 reporting year you hired one upper-level minority among 22 hirees overall (4.5%) and 16 hirees in upper-level positions (6.3%). Your response to our inquiry shows that the minority hiree, an Asian/Pacific female, was hired as a part-time announcer and was later promoted to full-time status. She now serves as the stations' Public Service Director. You also state that most of the 1988 hirees either submitted unsolicited applications or responded to newspaper advertisements.

Your Annual Employment Reports (FCC Form 395-B) filed during the license term generally show an absence of minorities in the stations' workforce. The available labor force for the Lexington, Kentucky Metropolitan Statistical Area (MSA) is 10.5% minority (9.2% Black, .6% Hispanic, .6% Asian/Pacific Islander, .1% American Indian). Your 1989 report lists one upper-level minority, an Asian/Pacific female, among 14 full-time employees, 13 in upper-level positions. Your 1988 report shows no minor-

ities on your full-time staff of 16 overall and 15 upper-level employees. Similarly, your 1987 report lists no minorities on your full-time staff of 14 overall and 13 upper-level employees.

We find the EEO record of WBBE/WMGB-FM similar to but more egregious than that of the licensee in *Application for Renewal of License of Stations WOOJ/WOOJ-FM, Lehigh Acres, Florida*, 4 FCC Rcd 6178 (1989). In *WOOJ*, we granted renewal for a full term subject to reporting conditions and a $15,000 forfeiture where, as is the case here, the licensee had an unproductive EEO program yet made no attempt to remedy its EEO record until the end of the license term. Like WOOJ, your recruitment efforts during the license term were limited to periodically writing various referral sources requesting that they provide qualified minority candidates, but without listing specific vacancies. While WOOJ contacted at least four minority sources, only one of your recruitment sources, the Lexington Urban League, is aimed at minorities. Further, from 1986 through 1988, WOOJ hired no minorities despite 35 hiring opportunities in an area which is 10.4% minority. From 1987 through 1989, your station hired only one full-time Black (who left the station after six weeks) despite 53 hiring opportunities in an area which is 9.2% Black. Finally, as was the case with WOOJ, you do not appear to have engaged in meaningful self-assessment of your EEO efforts.

We note your reliance on the promotion of an Asian/Pacific female to a full-time position in 1989 as having satisfied your EEO obligation by bringing the percentage of minority representation on your workforce into compliance with our processing guidelines. While the Commission does consider a station's overall minority employment in determining EEO compliance, we emphasize a station's efforts regarding the dominant minority in the labor force.[4] *Bilingual Bicultural Coalition of Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621,625 (D.C. Cir. 1978). Blacks are the dominant minority in the Lexington MSA, representing 87.6% of the available minority labor force, as opposed to Asian/Pacific Islanders who constitute only .6% of the minority labor force. Moreover, meeting or exceeding the processing guidelines no longer automatically demonstrates that adequate EEO efforts were made. *See Arkansas Educational Television Commission*, 3 FCC Rcd 1923, 1925 (1988).

Based on the foregoing, we conclude that you failed to exercise best efforts to comply with the Commission's EEO rules. You did not take meaningful and regular steps to recruit qualified minorities, nor did you analyze the stations' efforts to recruit, hire, promote and retain qualified minorities. The evidence shows repeated failures to comply with the Commission's affirmative action provisions set forth in Sections 73.2080 (b)(3), (b)(5), (c)(2), and (c)(5) of the rules. Accordingly, while we find that granting the applications will serve the public interest, we also find it appropriate to impose reporting conditions to monitor future performance as well as a Notice of Apparent Liability for Forfeiture in the amount of $18,000.[5] The amount specified was reached after careful consideration of the factors set forth in Section 503(b)(2) of the Communications Act.

Accordingly, IT IS ORDERED, that the applications of the Maycourt Company for renewal of licenses for stations WBBE/WMGB-FM ARE GRANTED subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, the Maycourt Company is hereby advised of its APPARENT LIABILITY FOR FORFEITURE in the amount of EIGHTEEN THOUSAND DOLLARS ($18,000) for repeated violation of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, in the manner described above.

IT IS FURTHER ORDERED, that the licensee of WBBE (AM) and WMGB-FM, is subject to the reporting conditions specified herein.

IT IS FURTHER ORDERED, that the licensee of stations WBBE/WMGB-FM is directed to submit to the Commission an original and one copy of the following information on April 1, 1990, April 1, 1991, and April 1, 1992:

(a) For the April 1, 1990 report, a list of all job vacancies during the 12 months preceding March 1, 1990, and for the April 1, 1991 and April 1, 1992 reports, a list covering the 12 months preceding March 1, 1991, and March 1, 1992, respectively, indicating the job title and full-time or part-time status of the position, the race or national origin, sex, and the referral source of each applicant for each job, and the race or national origin and sex of the person hired;[6]

(b) A list of employees as of the March 1, 1990 payroll period for the first report and as of the March 1, 1991 and March 1, 1992 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid to lowest paid), FCC Form 395-B classification, date of hire, sex, and race or national origin; and

(c) Details concerning the stations' efforts to recruit Blacks for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

In addition, the licensee may submit any information it believes relevant regarding the stations' EEO performance and its efforts thereunder. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may telephone the Mass Media Bureau's EEO Branch ((202) 632-7069). With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] We note your statement that you offered a Black sales intern a full-time position in 1988 which she declined.

[2] While none of these organizations produced a minority applicant, a minority was referred by an existing employee.

[3] In a later submission, you state that a Black female was referred by the mayor's office but that she did not apply for a position at the stations.

[4] We also consider the presence of non-dominant minorities that are present in the workforce in significant numbers.

[5] We are mindful of the recent conditional assignment of the licenses of WBBE (AM) and WMGB-FM from the Maycourt Company to Kentucky Radio Limited Partners. The forfeiture is assessed on the assignor. The reporting conditions pass automatically to the assignee. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989).

[6] Such a list might begin as follows: "(1) D.J., part-time -- white female, A.W.R.T.; white male, newspaper; black male, Urban League -- selected white female."

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-535**

In re Applications of

Vernon R. Baldwin & Billy W. Lanham d/b/a TRI-STATE COMMUNICATIONS — File No. BPH-870331PD

BROADSTAR COMMUNICATIONS, INC., DEBTOR-IN-POSSESSION — File No. BPH-870408KD

For Construction Permit for a New FM Station, Channel 282A, at Harrison, Ohio

**Appearances**

*Daniel F. Van Horn, Esquire*, and *Jay L. Birnbaum, Esquire*, on behalf of BroadStar Communications, Inc., Debtor-in-Possession; *Lauren A. Colby, Esquire*, on behalf of Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications.

**DECISION**

**Adopted: November 14, 1989; Released: November 22, 1989**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Before the Review Board are the *Summary Decision*, 4 FCC Rcd 6708 (1989)(S.D.), of Administrative Law Judge Joseph Stirmer (ALJ); the Exceptions thereto filed by BroadStar Communications, Inc., Debtor-in-Possession (Broadstar); and, the Reply to these exceptions filed by Tri-State Communications (Tri-State). Based upon our review of these documents, as well as the hearing record below, we affirm the ALJ and grant the application for construction permit of Tri-State.

2. By *Hearing Designation Order*, 3 FCC Rcd 6923 (1988), nine mutually- exclusive applications were originally set for comparative hearing. However, following (1) failures to pay the necessary hearing fees, (2) requests for voluntary dismissal of applications, and/or (3) settlement agreements entered into by some of the applicants, this proceeding presently involves only the two captioned applicants.

3. As a result of a petition to enlarge issues filed by Tri-State, the ALJ, by *Order*, FCC 89M-766, released March 13, 1989, specified the following issue against BroadStar:

> To determine whether BroadStar Communications, Inc., is qualified financially to construct and operate the proposed station.

4. In its petition to enlarge issues, Tri-State had alleged: (1) that BroadStar is wholly owned by Earnest L. James; (2) that BroadStar also owns 100% of the stock of JACI, Inc., the licensee of AM Broadcast Station WCIN, Cincinnati, Ohio, (3) that eight different tax liens have been filed against the licensee of WCIN; (4) that one such lien (filed in October 1983) is for federal taxes in the amount of $41,759.34; (5) that the aggregate liens currently on file against WCIN are in excess of $77,000; and (6) that these liens have been filed by federal government and various local and state agencies. In opposition, BroadStar represented that it was financially qualified; and, in support thereof, it claimed to be relying on a ($500,000) loan commitment letter from The Central Trust Company, N.A., dated April 6, 1987.

5. Subsequent to the addition of a financial issue, however, BroadStar filed an amendment to its application on May 5, 1989, withdrawing its reliance upon the 1987 Central Trust letter. BroadStar now claimed an intention to obtain new financing, and that it would amend its application to demonstrate the availabiity of such financing. The amendment withdrawing BroadStar's financial reliance on Central Trust was accepted by the ALJ. *Order*, FCC 89M- 1487, released May 19, 1989.

6. Further, on May 25, 1989, both BroadStar and JACI,Inc., filed petitions with the United States Bankruptcy Court for the Southern District of Ohio, seeking protection pursuant to Chapter 11 of the Bankruptcy Code. On the same date, Earnest L. James (BroadStar's 100% shareholder) filed under Chapter 7 of the Bankruptcy Code. As a result of these petitions, all of the stock of BroadStar was transferred from Earnest L. James to Mark Greenberger, the personal trustee-in-bankruptcy for Earnest L. James. Additionally, all of the assets of BroadStar became the property of the bankruptcy estate created as a result of BroadStar's Chapter 11 petition.

7. On August 21, 1989, BroadStar exchanged its hearing exhibits in this proceeding. To meet its financial requirement of some $340,000, BroadStar suggested that a new corporation might be substituted as the proposed applicant. This, it was alleged, would be accompanied by a request to the Bankruptcy Court to approve the removal of the BroadStar application from the bankrupt estate and by transferring that application to a potential new corporation, NewStar Communications Corporation (NewStar), in which Earnest L. James would be the sole voting stockholder. Additionally, BroadStar there represented that the funds needed to prosecute the application and to construct and operate the proposed station could be provided to NewStar by Minority Broadcast Investment Corporation (MBIC).

8. The terms and conditions of the proposed loan from MBIC were set forth in a letter dated August 17, 1989, which was included as an attachment to BroadStar's Hearing Exhibit 3. This letter asserted a "commitment to provide financing in the amount of $400,000 to NewStar Communications Corporation" by MBIC. It further provided that the proposed lender would receive "warrants" to acquire a 60% equity interest in NewStar, thus reducing the equity of Earnest L. James from 100% to 40%. To date, however, the Bankruptcy Court has not approved

BroadStar's proposed transfer arrangement, nor has BroadStar submitted a petition to substitute NewStar as the applicant in this proceeding.

9. In its exceptions, BroadStar concedes that it is not now financially qualified. BroadStar Exceptions at 9. However, the Commission maintains a bedrock requirement that an applicant "must provide substantial and reliable evidence showing 'sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue.'" *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989); 47 U.S.C. §308(b); *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 380, 388 (1980). Here, the financial qualifications of BroadStar were initially predicated on the availability of a $500,000 loan from Central Trust. But, BroadStar has withdrawn reliance upon that loan, and can only represent that "if BroadStar's principal, Earnest James is successful in transferring BroadStar's application to another entity controlled solely by James," it may *become* financially qualified. BroadStar Exceptions at 2.

10. Having candidly conceded that it is not financially qualified, we find no basis upon which to reverse the ALJ's grant of summary decision against BroadStar. As we have repeatedly held, an applicant must be "ready, willing and able." *Dutchess Communications*, 101 FCC 2d 243, 254 (Rev. Bd. 1985). Here BroadStar cannot meet the test, has not amended its pending application, and can only speculate that it *might*, at some unspecified future date, be in a position to *become* financially qualified.

11. Tri-Star, on the other hand, is fully qualified for the construction permit. While BroadStar's financial problems are regrettable, Section 308(b) of the Communications Act is mandatory. We cannot permit BroadStar's and James' bankruptcies to delay the initiation of a new broadcast service, especially where a fully qualified applicant is "ready, willing, and able."

12. ACCORDINGLY, IT IS ORDERED, That the Petition for Expedited Action filed by Tri-State Communications on October 23, 1989, IS DISMISSED as moot; and,

13. IT IS FURTHER ORDERED, That the application of BroadStar Communications, Inc., Debtor-in-Possession (File No. BPH-870408KD) IS DENIED; and that the application of Vernon R. Baldwin and Billy W. Lanham d/b/a Tri-State Communications (File No. BPH-870331PD) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-519**

In the Matter of

Amendment of Section 73.202(b), RM-6856
Table of Allotments,
FM Broadcast Stations.
(West Rutland, Vermont)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 22, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Brian Dodge (petitioner), permittee of Station WVNH(FM), Channel 298A at West Rutland, Vermont, seeking the substitution of Channel 298C3 for Channel 298A at West Rutland.[1] Petitioner also requests the modification of his construction permit for Station WVNH(FM) to specify the higher powered co-channel. Petitioner expresses his intention to apply for the channel, if allotted.

2. The allotment of Channel 298C3 to West Rutland can be made in compliance with the Commission's minimum distance separation requirements from the restricted site specified by the petitioner.[2] Since West Rutland is located within 320 kilometers (200 miles) of the U.S.-Canadian border, we must obtain concurrence of the Canadian government for the proposal.

4. As requested, we shall propose to modify the construction permit of Station WVNH(FM) at West Rutland to specify operation on Channel 298C3 in lieu of Channel 298A in accordance with Section 1.420(g) of the Commission's Rules. Accordingly, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent class channel at West Rutland.

5. In view of the fact that West Rutland, Vermont, could receive its first wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| West Rutland, Vermont | 298A | 298C3 |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 16, 1990,** and reply comments on or before **January 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Brian Dodge
P. O. Box 105FM
Hinsdale, NH 03451
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTES**

[1] We note that the petitioner failed to provide an address in his petition in violation of the signature and verification requirements of Section 1.52 of the Commission's Rules. Such failure generally renders a petition defective. However, we have ascertained petitioner's address from the Commission's records and will consider the proposal.

[2] The coordinates are 43-39-40 and 72-53-25, which is located 14.6 kilometers (9 miles) northeast of the city.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-518**

In the Matter of

Amendment of Section 73.202(b), RM-6964
Table of Allotments,
FM Broadcast Stations.
(Rutland, Vermont)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 31, 1989; Released: November 22, 1989**

By the Chief, Allocations Branch:

1. At the request of Edward G. and Carol K. Pickett (petitioner), the Commission has before it for consideration a petition for rule making seeking the substitution of Channel 233C3 for Channel 233A at Rutland, Vermont, and the modification of its license for Station WKLZ(FM) at Rutland to specify operation on the higher powered channel. Petitioner expressed its interest in applying for the channel, if allotted.

2. Channel 233C3 can be allotted to Rutland in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.8 kilometers (12.3 miles) north of the city.[1] The restriction is required in order to avoid short spacings to Station WMXR(FM), Channel 230A at Woodstock, Vermont, Station WHGC(FM), Channel 232A, Bennington, Vermont, Station WNYV(FM), Channel 232A, Whitehall, New York, Station WRAV(FM), Channel 233A, Ravena, New York and vacant but applied for Channel 234A at Lake Luzerne, New York.[2] The proposed allotment of Channel 233C3 at Rutland will require the relocation of Station WKLZ(FM)'s present transmitter site. Petitioner has indicated a willingness to relocate its transmitter site.

3. Since Rutland is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government is required for the proposal.

4. We shall propose to modify the license of Station WKLZ(FM) to specify operation on the higher class channel, Channel 233C3, in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Rutland.

5. In view of the fact that Rutland, Vermont, could receive an additional expanded FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| City | Channel No. Present | Proposed |
|---|---|---|
| Rutland, Vermont | 233A, 246C2, 251C2 | 233C3, 246C2, 251C2 |

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice* to the following: John Anthony Bulmer, 1943 Thristlewood Court, Ashtabula, OH 44004.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **January 16, 1990,** and reply comments on or before **January 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John E. Fiorini III, Esquire
Heron, Burchette, Ruckert & Rothwell
1025 Thomas Jefferson St., N.W.
Suite 700
P. O. Box 96670
Washington, D.C. 20090
(Counsel to petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] The coordinates are 43-47-09 and 72-59-29.

[2] The three pending applicants for Channel 234A at Lake Luzerne, New York, are Rania S. Levan (BPH-880219MC), Luzerne FM Limited Partnership (BPH-880219MM) and John Anthony Bulmer ("Bulmer") (BPH-880219MK). Bulmer's application specified a site which is short-spaced to this proposal. Thus, we shall serve a copy of this proposal on Bulmer, since if adopted, he would be required to amend his application to specify a non-conflicting transmitter site. *See Freedom and Morgan Hill, California,* 52 FR 13242, April 22, 1987.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-526**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6974 |
| Table of Allotments, | RM-7014 |
| FM Broadcast Stations. | |
| (Golconda and Murphysboro, Illinois | |
| and Lutesville, Missouri) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 8, 1989; Released: November 22, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration two separately filed petitions for rule making. The first petition, filed on behalf of C R Broadcasting, Inc. ("C R"), licensee of Station WTAO(FM), Murphysboro, Illinois, requests the substitution of Channel 286B1 for Channel 285A at Murphysboro, Illinois, and modification of the license for Station WTAO to specify the higher class channel. The proposal to upgrade at Murphysboro requires the substitution of Channel 232A for vacant but applied for Channel 286A at Golconda, Illinois, and substitution of Channel 281A for vacant and unapplied for Channel 286A at Lutesville, Missouri. The second petition, filed by William L. Moir ("Moir"), seeks the substitution of Channel 232A for vacant but applied for Channel 286A at Golconda, Illinois.[1] Moir's petition will be treated as an acquiescense in CR's request.[2]

2. An engineering analysis has determined that the proposed allotment of Channel 286B1 can be made to Murphysboro, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.4 kilometers (7 miles) southeast. The proposed substitution of Channel 232A for Channel 286A at Golconda can be achieved in compliance with the Commission's minimum distance separation requirements at the application site with a site restriction of 2.7 kilometers (1.7 miles) north. Channel 281A can be allotted to Lutesville, Missouri, in compliance with the Commission's minimum distance separation requirements. [3]

3. As requested, we shall propose to modify the license for Station WTAO(FM) to specify operation on Channel 286B1. In addition, we shall also propose to substitute Channel 232A for Channel 286A at Golconda, Illinois, and to substitute Channel 281A for Channel 286A at Lutesville, Missouri. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 286B1 at Murphysboro or require petitioner to demonstrate the availability of an additional equivalent channel for use by such other interested parties.

4. We believe the public interest would be served by proposing the channel substitutions above, since it could allow Station WTAO(FM) to expand its coverage area. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Murphysboro, Illinois | 285A | 286B1 |
| Golconda, Illinois | 286A | 232A |
| Lutesville, Missouri | 286A | 281A |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 16, 1990,** and reply comments on or before **January 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the parties, or their counsel or consultant, as follows:

Marnie K. Sarver
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
(Counsel for C R Broadcasting, Inc.)

William L. Moir
11920 Gay Glen
St. Louis, MO 63043

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Channel 286A was allotted to Golconda, Illinois, in MM Docket No. 86-306. A filing window opened on January 25, 1988, and closed February 25, 1988. During this period no applications were filed. On March 15, 1989, Moir filed a "first come first serve" application (BPH-890315MG) for the channel.

[2] In support of his petition Moir states that he has attempted to secure the Federal Aviation Administration (FAA) approval for the site specified in his application on Channel 286A, but that the FAA maintains that any use of Channel 286A in the vicinity of Golconda will cause intermodulation interference to certain FAA facilities and has refused to issue a "No Hazard" determination for Channel 286A at the application site. Moir notes that the FAA has determined that Channel 232A would not be a hazard to air navigation.

[3] The coordinates for Channel 286B1 at Murphysboro, Illinois, are North Latitude 37-40-35 and West Longitude 89-16-32. The coordinates for Channel 232A at Golconda, Illinois, are North Latitude 37-23-32 and West Longitude 88-29-21. The coordinates for Channel 281A at Lutesville, Missouri, are North Latitude 37-19-00 and West Longitude 89-57-30.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-621**

In the Matter of

Amendment of Section 73.202(b), RM-6519
Table of Allotments,
FM Broadcast Stations.
(Beeville, Texas)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 8, 1989; Released: November 22, 1989**

By the Chief, Allocations Branch:

1. At the request of Hamon Broadcasting, Inc. (petitioner), permittee of Station KYTX(FM), Channel 250A, Beeville, Texas, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1250 (1989), proposing the substitution of Channel 250C2 for Channel 250A at Beeville, and modification of its license to specify operation on the higher class co-channel. Petitioner filed supporting comments reaffirming its intention to apply for the channel.

2. Based on the information before us, we believe the public interest would be served by substituting Channel 250C2 for Channel 250A at Beeville, since it could provide that community with enhanced FM broadcast service. The substitution can be made in compliance with the Commission's minimum separation requirements at the site specified by the petitioner.[1] Since Beeville is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been obtained.

3. In accordance with Section 1.420(g) of the Commission's Rules, we have authorized the modification of the license of Station KYTX(FM) to specify operation on Channel 250C2.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 8, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Beeville, Texas | 250C2, 285A[2] |

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Station KYTX(FM), Beeville, Texas, IS MODIFIED, to specify operation on Channel 250C2 in lieu of Channel 250A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] The coordinates for the site specified by the petitioner are 28-24-00 and 98-01-00, which is located 26.5 kilometers (16.4 miles) west of Beeville.

[2] Pending before the Commission is a proposal to substitute Channel 289C3 for Channel 285A at Beeville, Texas. *See* RM-6860.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-403**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b) | RM-5776 |
| Table of Allotments | RM-6189 |
| FM Broadcast Stations | RM-6190 |
| (Douglas, Broxton, Hinesville, and Hazelhurst, Georgia) | |

**ERRATUM**

**Released: November 22, 1989**

By the Acting Chief, Policy and Rules Division:

1. On October 27, 1989, we released an *Order to Show Cause* in this proceeding (FCC 89-1303) directed against Jeff Davis Broadcasters, Inc., licensee of Station WVOH-FM, Channel 228A, Hazelhurst, Georgia, to show cause why its license should not be modified to specify operation on Channel 229A. Paragraph 7 of that document inadvertently identified Station WVOH-FM as being licensed to Broxton, Georgia. Paragraph 7 is hereby corrected to identify Station WVOH-FM as being licensed to Hazelhurst, Georgia.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-525**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-7120 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Harker Heights, Texas) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 8, 1989; Released: November 22, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Mid-Texas Communications, Inc. (petitioner), licensee of Station KIXS(FM), Channel 288A at Harker Heights, Texas, requesting the substitution of Channel 286C2 for Channel 288A at Harker Heights, and the modification of its station's license to specify the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 286C2 can be allotted to Harker Heights, Texas, in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner, which is located 30.6 kilometers (19.0 miles) southeast of the city reference coordinates.[1] There is a short spacing to Station KPLE(FM), Channel 285A at Temple, Texas. However, Station KPLE(FM) was granted an upgrade on Channel 282C2 in MM Docket No. 86-442, 53 FR 16551, May 10, 1988.[2] Therefore, final action in this proceeding may be postponed until Station KPLE(FM) has been issued a construction permit and is licensed accordingly.

3. As requested, we shall propose to modify the license of Station KIXS(FM) to specify operation on Channel 286C2 in lieu of Channel 288A. We shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Harker Heights, in accordance with Section 1.420(g) of the Commission's Rules.

4. In view of the fact that Harker Heights, Texas, could receive a first wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Harker Heights, Texas | 288A | 286C2 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 16, 1990,** and reply comments on or before **January 31, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John E. Fiorini, III, Esquire
Mark Van Bergh, Esquire
Joal R. Hall, Esquire
Heron, Burchette, Ruckert & Rothwell
Suite 700
1025 Thomas Jefferson Street, N.W.
Washington, D. C. 20007
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] The coordinates are 30-54-50 and 97-30-00.

[2] Station KPLE(FM) currently has an application on file to effectuate the upgrade (BPH-881115IC).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 22, 1989**

**AMERICAN TELEPHONE AND TELEGRAPH COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL PUBLIC COMMENT INVITED**

On November 8, 1989, the American Telephone and Telegraph Company (AT&T) filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. AT&T filed its original manual in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to the cost manual no later than **December 11, 1989.** Replies should be filed by **December 27, 1989.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812, Washington, D. C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N. W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N. W., Room 812, Washington, D. C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 22, 1989**

## TELEPHONE AND DATA SYSTEMS, INC. FILES TWO PETITIONS FOR WAIVER OF PART 36 RULES AND THE "STUDY AREA" DEFINITION PUBLIC COMMENT INVITED

On November 3, 1989, Telephone and Data Systems, Inc. (TDS) filed a petition for waiver of certain Part 36 rules and the "study area" definition in order to consolidate study areas of several of its wholly owned LECs in conjunction with mergers of those companies. In a separate petition filed concurrently, TDS requests a blanket waiver of the Part 36 rules to facilitate study area consolidations that result from the merger of LECs that are commonly owned and when the consolidation has no material effect on the Universal Service Fund or high cost support received by the company, based on estimates from recent information.

Parties may file comments on these petitions no later than **December 5, 1989.** Replies should be filed by **December 15, 1989.** Comments should reference AAD 9-1937 for the consolidation of TDS' LEC study areas and AAD 9- 1938 for the blanket waiver. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D. C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N. W., Washington, D. C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N. W., Room 812, Washington, D. C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 22, 1989**

**MID-PLAINS TELEPHONE COMPANY, INC. FILES PETITION FOR DECLARATORY RULING REGARDING THE COMMISSION'S PART 36 SEPARATIONS PROCEDURES PUBLIC COMMENT INVITED**

On September 14, 1989, the Mid-Plains Telephone Company, Inc. (Mid-Plains) filed a petition for declaratory ruling requesting that the Commission declare that: (1) the Part 36 Separations procedures represent the only legally valid method for separating a local exchange carrier's interstate and intrastate costs for purposes of determining the carrier's intrastate revenue requirement, and (2) the Wisconsin Public Service Commission (WPSC) in Docket Nos. 3650-DR-100, 3650-TR-100 and 3650-TI-101 has contravened the Communications Act of 1934 by approving a jurisdictional separations methodology inconsistent with the Commission's Part 36 Separations procedures. Mid-Plains also requests that the Commission issue an order preempting the WPSC from utilizing the residual ratemaking methodology.

In its petition, Mid-Plains states that the WPSC issued an Order denying its request to have its intrastate settlement rates determined on the basis of its intrastate costs, as determined by a cost study performed pursuant to the Part 36 separations procedures prescribed by this Commission. Mid-Plains alleges that the WPSC applied an unlawful separations methodology to it and other average schedule companies and that the WPSC has ordered Mid-Plains to refund $220,265 to its customers and to reduce its annual revenue by $17,459.

Parties may file comments on this petition no later than **December 5, 1989.** Replies should be filed by **December 15, 1989.** Comments should reference AAD 9-1939. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N. W., Room 812, Washington, D. C. 20554 and to International Transcription Services, Inc. (Inc.) (ITS), 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D. C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-504**

In re Applications of

| | |
|---|---|
| SOUND OF LIFE, INC. (hereafter "Sound") | File No. BPED-871214MC |
| FAMILY BROADCASTING, INC. (hereafter "Family") | File No. BPH-871215MA |
| George M. Ragsdale, Daniel F. Viles, Jr., and Gregory T. Lano d/b/a MID-ATLANTIC BROADCASTING COMPANY (hereafter "Mid-Atlantic") | File No. BPH-871215MC |
| WAMC (hereafter "WAMC") | File No. BPED-871216MA |
| FRANCIS W. BELL (hereafter "Bell") | File No. BPH-871216MD |
| R. BRYAN JACKSON (hereafter "Jackson") | File No. BPH-871216ME |
| TRI-CITIES FM LIMITED PARTNERSHIP (hereafter "Tri-Cities") | File No. BPH-871216MG |

For Construction Permit for a
New FM Station on Channel 242A (96.3 MHz) in
Voorheesville, New York

**HEARING DESIGNATION ORDER**

**Adopted: October 26, 1989; Released: November 22, 1989**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Family*. Section II, Item 4 of FCC Form 301 (October 1986) requires that applicants specify their address (number, street, city, state) as well as the home address of each of their principals. Family has not completed Item 4 correctly, giving a post office box number as the residence address for principals Robert & Pamela Peake and for Timothy Dodge. Accordingly, Family must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. *WAMC*. WAMC is a non-profit, educational corporation chartered by the University of the State of New York Board of Regents, and is the licensee and/or permittee of FM Stations WAMC (Albany, New York), WCAN (Canajorharie, New York) and WAMK (Kingston, New York). The applicant seeks a waiver of 47 C.F.R. § 73.1125(a)(4), proposing to operate a Voorheesville station in tandem with its Albany station and in the identical fashion it currently programs Canajoharie (and Kingston upon the commencement of program test authority). In order to ensure that local issues in Voorheesville will be met, WAMC represents that it will: (1) add an individual from Voorheesville to its Community Advisory Board; (2) conduct a yearly ascertainment of the Voorheesville community; (3) maintain a public inspection file and local telephone number in Voorheesville, and; (4) cover Voorheesville and the entire region in its news and public affairs programming.

4. The Commission has traditionally allowed noncommercial educational licensees to operate in this manner. *See Nebraska Educational Television Commission*, 4 RR 2d 771 (1965). In so doing, the Commission recognizes the realities of public broadcasting funding and the ongoing problems of educational licensees in raising the necessary funds to expand and provide noncommercial educational programming to as many viewers as possible. WAMC's proposal is consistent with this concept. The savings realized from not having to construct a main studio can be utilized to assist WAMC in expanding quality programming to a greater number of listeners. We conclude, therefore, that good cause exists for not locating a main studio in Voorheesville and, in light of the above, WAMC's request for waiver of 47 C.F.R. § 73.1125(a) is granted.

5. *Tri - Cities*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Tri-Cities filed such a statement, it is deficient since it failed to list any women's organizations it proposed to utilize to encourage the referral of qualified female applicants. Accordingly, Tri-Cities will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

6. Information before the Commission indicates that Tri-Cities was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

| City/State | Docket No. |
|---|---|
| Solona, Florida | 87-464 |
| Rockledge, Florida | 87-556 |
| Silver Springs, Florida | 88-119 |
| East Ridge, Tennessee | 88-122 |
| Oliver Springs, Tennessee | 88-201 |
| Des Moines, Iowa | 88-238 |
| Nags Head, North Carolina | 88-277 |
| Tyler, Texas | 88-280 |
| Raleigh, North Carolina | 88-306 |
| Sedona, Arizona | 88-335 |
| Mableton, Georgia | 88-400 |
| Evansville, Indiana | 88-403 |
| Swanton, Ohio | 88-432 |
| Atlantic City, New Jersey | 88-433 |

An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Tri-Cities qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

7. Item 5(a) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application pending before the Commission. Although Tri-Cities responded to Item 5(a) in the affirmative, it neglected to indicate that Hilary Johnson and Lynn E. Knight each hold a 3.3% limited partnership interest in Kern County Broadcast Partnership, the 80% equity owner of Bakersfield, California applicant Kern County Broadcast Limited Partnership (File No. BPH-880114NE).

8. Similarly, Item 5(b) requires the applicant to indicate if it or any party to its application has or had any interest in a broadcast application which was dismissed with prejudice by the Commission. If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Tri-Cities responded in the negative to Item 5(b). However, Commission records indicate that the Cone Grandchildren Educational Trust (9.9%) and Jerry D. Edwards (3.3%) were limited partners in Bennington, Nebraska applicant Nebraska Broadcast Limited Partnership (File No. BPH-871109MJ). Our records indicate that Nebraska Broadcast's application was dismissed with prejudice on March 23, 1989. *M & K Communications*, FCC 89M-956 (released March 24, 1989). Since Tri-Cities failed to timely amend its application pursuant to 47 C.F.R. § 1.65, an appropriate issue will be specified below.

9. *Other matters*. Sound and WAMC are applying for noncommercial educational stations on a commercial frequency. Both submitted their proposals on FCC Form 340, which does not require a 70 dBU (city grade) contour map or any calculations of distances to the 70 dBU contour.[1] Noncommercial stations proposing to operate on commercial channels must comply with regulations governing commercial station applications. Therefore, Sound and WAMC must amend their applications within thirty days of the date of this Order to include the distances to their respective proposed 70 dBU contours and to provide a map showing city grade coverage complying with the note in 47 C.F.R. § 73.315(a). Accordingly, a city-grade issue will be specified to determine whether Sound and WAMC's proposals, as amended, would provide the required coverage of Voorheesville and, if not, whether circumstances exist which warrant waiver of the rule.

10. Sound, Family, Mid-Atlantic, WAMC and Jackson propose to locate their respective transmitting antennas on or near existing towers: Sound on the tower currently used by TV Station WMAT and FM Stations WVCR and WMHT, Family and Mid-Atlantic near (91 and 55 meters, respectively) TV Station WMHX's facilities, Jackson on the tower currently used by UHF-TV Station WXXA, and WAMC on the WRGB-TV's tower. None of the listed applicants have evaluated the radiation contribution of the noted TV stations and other nearby RF sources in their radiation hazard showings. Our engineering study indicates that these proposals may therefore significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned the applicants may have failed to comply with the environmental criteria set forth in the Report and Order in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the four noted applications may each have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. These studies must include the cumulative effects of the proposed operation and any collocated or nearby RF sources. In this regard, if the sites are presently, or will be, fenced in compliance with the guidelines, the applicants are required to so state and give the distance from the base of the tower to the fence. Accordingly, Sound, Family, Mid-Atlantic, WAMC and Jackson will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

11. Mid-Atlantic (on June 30, 1988) and Tri-Cities (on May 9 and August 12, 1989) have petitioned for leave to amend their applications. The last date for filing minor amendments as of right in this proceeding was February 29, 1988. While Mid-Atlantic indicated that the purpose of its amendment was to report changes in the broadcast applications of principal Daniel F. Viles, Jr., a search of both the original and triplicate versions of Mid-Atlantic's file does not reveal the presence of its accompanying

amendment. Accordingly, its petition will be dismissed. Under Section 1.65 of the Commission's Rules, Tri-Cities amendments are accepted for filing. However, since an applicant may not improve its comparative position after the time for filing amendments as of right has passed, any comparative advantage resulting from the amendments will be disallowed.

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party-in-interest to Tri-Cities' application.

2. To determine whether Tri-Cities' organizational structure is a sham.

3. To determine whether Tri-Cities violated Section 1.65 of the the Commission's Rules and/or lacked candor by failing to report: (i) the designation of character issues against other applicants in which one or more of its partners has an ownership interest, (ii) the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending, and (iii) the interest held by one or more of its partners in applications pending and/or dismissed with prejudice by the Commission.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Tri-Cities possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine whether the proposals of Sound and WAMC would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

6. If a final environmental impact statement is issued with respect to Sound, Family, Mid-Atlantic, WAMC and/or Jackson in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That Family shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That WAMC's request for waiver of 47 C.F.R. § 73.1125(a)(4) IS GRANTED.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Tri-Cities shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That Sound and WAMC submit amendments as described in paragraph 9 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, Sound, Family, Mid-Atlantic, WAMC and Jackson shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

20. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Mid-Atlantic IS DISMISSED and that the petitions for leave to amend filed by Tri-Cities ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

**FOOTNOTE**

[1] WAMC indicates that although "the coverage area of the proposed Voorheesville facility is completely encompassed by the predicted service contour of WAMC, parts of the Capital District Region are presently underserved by an adequate over-the-air signal from WAMC."

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-559**

In re Applications of:

PRUITT AND OWEN File No. BPH-860218MQ
(hereafter P & O)

For a Construction Permit
For a New FM Station
In Corydon, Indiana on Channel 299B

## HEARING DESIGNATION ORDER

**Adopted: October 26, 1989; Released: November 22, 1989**

By the Chief, Audio Services Division :

1. The Commission has before it the above-captioned application for a new FM station.[1]

2. On June 4, 1986, P & O's application was returned as unacceptable for filng for proposing a site which was short-spaced to the buffer-zone protection afforded to first adjacent channel station WYHY, Lebanon, Tennessee.[2]

3. On June 13, 1986 P & O filed a Petition for Reconsideration arguing that its application was incorrectly returned. That petition was denied in the ensuing hearing designation order. [3] Thereafter, on January 6, 1988, P & O filed an Application for Review again asserting that dismissal of its application was inappropriate. In *Special Markets Media, Inc.*, 4 FCC 5753 (1989), the Commission ruled that applicants for construction permits for new FM assignments could have reasonably assumed that the buffer-zone requirement did not apply to them. Therefore, applicants should not have been dismissed for failing to honor the buffer-zone. Consequently, it was ordered that P & O's Application for Review be granted and its construction permit application be reinstated. Subsequent studies have found P & O's application to be acceptable for filing.

4. On January 31, 1989, the presiding Administrative Law Judge issued an initial decision in the Corydon, Indiana proceeding (MM Docket 87-559) 4 FCC Rcd 1537 (1989). The case is pending before the Commission's Review Board. The Commission, however, in *Special Markets, supra*, authorized the appropriate adjudicatory entity in the respective affected proceedings to reopen the records. Accordingly, it is necessary for the Review Board to reopen the record and remand the proceeding to the presiding Judge.

5. P & O petitioned for leave to amend its application on May 19, 1986 and on January 4, 1988. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Except as may be indicated by any issues specified below, the applicant is qualified to construct and operate as proposed. Since the proposal is mutually exclusive with others previously designated, it must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the application IS DESIGNATED FOR HEARING AND CONSOLIDATED in the proceeding MM Docket 87-559 which has been terminated and will be reopened upon the same issues, which were:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the May 19, 1986 and the January 4, 1989 amendments ARE HEREBY ACCEPTED.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

### FOOTNOTES

[1] The application filed by P & O is mutually exclusive with two other applications previously designated for a consolidated hearing in MM Docket No. 87-559.

[2] The "buffer-zone" was an additional 16 kilometers of protection (beyond the minimum distance separation requirement provided for in 47 C.F.R. § 73.207) temporarily afforded Class C

stations operating with facilities less than the Class C minimum established in the *Report and Order* in BC Docket 80-90, 94 FCC 2d 152 (1983). The purpose of this extra protection, which was in effect from March 1, 1984 to March 1, 1987, was to allow these protected stations some flexibility should they need to move in order to upgrade to meet the Class C minimum. If the protected station did not upgrade within the allotted time, it would be reclassified to a lower class.

[3] *Corydon Broadcasters Limited*, 2 FCC Rcd 7521 (M.M. Bur. 1987).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Competitive Telecommunications Association,
ITT Communications Services, Inc.,
Complainants,

v. File No. E-89-394

United Telephone Company of Missouri,
Defendant.

**ORDER**

**Adopted: November 14, 1989; Released: November 24, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1989, Competitive Telecommunications Association and ITT Communications Services, Inc. (hereinafter collectively referred to as "Complainants") filed a formal complaint against United Telephone Company of Missouri (hereinafter referred to as "United of Missouri") alleging certain statutory and tariff violations related to defendant's billing and collection rates for the period of October 1, 1985 to December 31, 1986.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On November 9, 1989, counsel for Complainants and United of Missouri filed a joint motion seeking dismissal of the complaint and authorization of their settlement agreement. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 88-567**

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Implement
a Conditional Authorization Procedure
for Proposed Private Land Mobile
Radio Service Stations

## REPORT AND ORDER

**Adopted: October 26, 1989; Released: November 24, 1989**

By the Commission:

## I. INTRODUCTION

1. By *Notice of Proposed Rule Making* (*Notice*) [1] we proposed to amend Section 90.159 of our Rules, 47 C.F.R. § 90.159, to allow applicants for new land mobile stations in the frequency bands below 470 MHz, where frequencies are assigned on a shared rather than an exclusive basis, to commence operations under a conditional permit on completing the applicable frequency coordination process[2] and filing their applications with the Commission. Applicants for modification and assignment of existing stations in these bands and applicants for itinerant frequencies will also be allowed to commence operations on filing their applications.

2. In this *Report and Order* we are adopting a self-certification program, substantially as proposed in our *Notice*, under which an applicant may operate on a conditional basis if it certifies that its station is eligible for our conditional licensing program. Eligibility for this program is evidenced by the applicant's certification that its proposed radio station meets specified conditions that demonstrate that the application can be routinely granted because it raises no special issues. These conditions, as adopted, are:

(1) that the proposed station is south of Line A or west of Line C; [3]

(2) that granting the application does not require rule waiver;

(3) that the proposed antenna structure has been previously studied by the Federal Aviation Administration and determined to pose no hazard to aviation safety as required by Section 17.4 of the Commission's Rules; or that the proposed antenna or tower structure does not exceed 6.1 meters (20 feet) above ground level or above an existing man-made structure (other than an antenna structure), if the antenna or tower has not been previously studied by the Federal Aviation Administration and cleared by the Federal Communications Commission;[4]

(4) that the applicant has determined that the proposed station will not significantly affect the environment as defined by Section 1.1307 of our Rules;[5]

(5) that the proposed station protects radio "quiet" zones and monitoring facilities as specified in Section 90.177 of our Rules;[6] and

(6) that the required frequency coordination procedures have been completed and that an application has been submitted to the Commission stating the frequency the applicant expects to use.[7]

3. Our *Notice* solicited comments concerning the scope of the proposed conditional licensing program and specifically sought comments on whether applicants for private land mobile radio stations operating above 470 MHz should be included in this new procedure. With the exception of applicants for one-way shared paging frequencies in the 929-930 MHz band, for the reasons discussed below, we decline to expand this conditional licensing program to applications involving stations operating in any other frequency bands above 470 MHz.

## II. BACKGROUND

### A. *Petition* for *Rule Making*

4. This proceeding was initiated in January 1989 as a result of proposals submitted by the Special Industrial Radio Service Association, Inc. (SIRSA) and the National Association of Business and Educational Radio, Inc. (NABER), hereinafter referred to as "petitioners," for implementation of a temporary authorization procedure for proposed Private Land Mobile stations operating below 800 MHz.[8] Under our existing rules, applicants for new stations, applicants requesting modification of existing stations, and applicants seeking to obtain station authorizations through assignments of authorization or transfers of control are prohibited from operating until a license is granted, a process that generally takes approximately 20 to 45 days.

5. "Add-on" user applicants of existing multiple licensed mobile relay stations, however, may operate immediately in accordance with the provisions of Section 90.159 of our Rules.[9] Under this procedure, an applicant for a Business Radio Service station license utilizing an existing authorized facility is permitted to operate its radio station pursuant to a temporary permit for a period not to exceed 180 days. The temporary permit is evidenced by a certification acknowledging the temporary authorization and the mailing of a formal application and accompanying frequency coordination recommendation to the Commission.

6. The petitioners sought to expand the "add-on" provisions of Section 90.159 of the Rules to applicants for new private land mobile stations that have satisfied the Commission's frequency coordination requirements.[10] They asserted that the Commission's existing "add-on" temporary licensing program has benefited licensees without placing any additional burden on the Commission. They maintained that expanding the temporary licensing concept to a wider range of applicants would be a logical

extension of our instant "add-on" procedure and that such a process would speed the progress of industrial and commercial activities.

**B.** ***Notice of Proposed Rule Making***

7. In our January 1989 *Notice* we tentatively concluded that a system of conditional authority for routine private land mobile applications that involve no special or non-routine issues would enhance our ability to provide expeditious service to the public. We also stated that implementing this procedure would be consistent with Section 331(a) of the Act, would encourage improved spectrum efficiency and would reduce the regulatory burden on private land mobile licensees. We proposed to limit this program, at least initially, to applications for shared frequencies below 470 MHz to avoid any potential disruption to the operations of existing licensees in the higher bands where frequencies are authorized on an exclusive basis.

8. This new conditional licensing procedure applies to routine applications for shared frequencies. In instances where evidence of frequency coordination is required,[11] satisfaction of the frequency coordination process, whether by recommendation of a frequency coordinator or by the direct access application alternative method of coordination currently under consideration by the Commission,[12] is only one of several elements that the applicant must certify to in order to engage in conditional operations. Conditional licensing does not expand the role and responsibilities of frequency coordinators under the existing coordination provisions of Section 90.175 of the Commission's Rules. In accordance with current procedures, coordinators would remain responsible for reviewing items 1-25 of the application Form 574 as necessary to their frequency coordination responsibilities.[13] Coordinators would perform the coordination process and recommend the most appropriate frequency. Coordinators would file the application with the fee on behalf of the applicant and notify the applicant that the frequency coordination recommendation had been made and that the application had been filed.[14] Then if all other conditions for this program have been satisfied, the applicant could commence operations under the conditional authorization provisions of Section 90.159 of the Rules.

9. To identify the category of routine applications that would be covered under this program, we proposed a system of applicant self-certifications. Thus, under our proposal, the applicant would be required to certify that the proposed station met the requisite conditions for conditional licensing. We proposed to provide for these certifications by amending Form 574 to include the additional statements, or by providing an additional form to be completed only by applicants for private land mobile radio systems below 470 MHz who desire to use the conditional licensing provisions. Either way, we stated that the applicant would be responsible for indicating that it was in compliance with these requirements and that it intended to operate pursuant to its conditional authorization. Additionally, we indicated that we would include on the application form a warning expressly providing that conditional authority may be terminated at any time by the Commission. This warning would include a statement that the applicant assumes all risks in the event conditional authority is terminated or the application is subsequently dismissed or denied.[15]

10. Once the applicant can certify to all conditions, operations may begin coincident with the filing of the application with the Commission. We proposed that the applicant would be free to commence operations, for a period not to exceed 180 days,[16] if it certified that it met the relevant conditions. During this period, the applicant would be required to maintain its certification form that entitles the applicant to engage in conditional operations and a copy of the filed application with its station records as evidence that it had received valid conditional authority.

11. Whether or not the applicant can certify that it is eligible for conditional authority, the coordinator would continue, as usual, to file the coordination recommendation and application for the applicant. If a direct access process is adopted, the mailing of a completed application to the Commission would signal the ability to commence operations. The applicant, however, could not place its proposed station in operation until the Commission reviewed and granted the application if the applicant could not certify that it is eligible for conditional authority.

12. We noted that adoption of this conditional licensing program would require a system of interim call signs for stations operating under conditional authority. We stated that the interim identification system specified in Section 2.302 of our Rules[17] for add-on users of existing private multiple licensed mobile relays could be used to identify these interim operations. This rule section provides that the interim call sign for a station operating under a conditional temporary authorization shall be the alphabetic characters "WT" followed by the seven digits of the applicant's local telephone number. We indicated that the use of a telephone number as part of a conditional call sign would facilitate identification if interference problems were to occur.

13. In our *Notice*, we invited comments on all aspects of our conditional licensing proposal. Specifically, we requested comments concerning the conditions or restrictions that should be placed on conditional licensing and whether conditional licensing should be applied to operations above 470 MHz. We also sought comment on our tentative conclusion that there was a sound legal basis for implementing this program.

## III. COMMENTS/DISCUSSION

**A.** ***Expansion of the Commission's Existing Conditional Licensing Procedures***

14. We received 15 comments and 7 reply comments in response to the Notice.[18] With two exceptions, the commenting parties support the underlying concept of the proposal to extend conditional licensing beyond its current application to "add-on" users of existing licensed mobile relay stations. Generally speaking, those favoring the proposal believe that such a procedure would promote the more effective and efficient use of the land mobile radio spectrum by expediting service to the public.

15. Teletech and Merrill T. See strongly oppose extension of the conditional licensing process. Teletech concedes that the proposal is well intentioned in that it attempts to permit the applicant to operate its facility as quickly as possible. Teletech, however, argues that the proposal is misguided because applicants must still wait for the delivery and installation of their radio equipment which frequently does not occur until after the license is

granted. Thus, Teletech characterizes instant licensing as a needless procedure that is contrary to the public interest because it would unnecessarily increase the role of frequency coordinators in the Commission's application process. Teletech and Merrill T. See contend that coordinators would use the increased authority provided to them by the proposed instant licensing procedure to justify high fees.

16. We are not persuaded by the assertions of Teletech and See that expansion of our existing conditional licensing procedures increases the role of the coordinators. Under the existing provisions of Section 90.159 of the Rules, "add-on" applicants can commence conditional operations upon filing an application that is accompanied by a frequency coordination recommendation. We merely seek to extend this procedure to appropriate categories of applications, which may or may not require frequency coordination, without any change in the role of the coordinator.

17. Moreover, as discussed in the *Notice*, the proposed procedure is based on the applicant's self-certifications and does not alter the coordinator's existing role or responsibilities.[19] Teletech and See have provided no information to support their predictions that coordinators would use conditional licensing as an excuse to increase their fees. As this proposal does not change the coordinators' existing role, there is no basis for such a fear. SIRSA, moreover, specifically addressed Teletech's concerns in its reply comments wherein it stated that it "has never contemplated raising its fees as a result of the conditional authorization program. . . [because] implementation of the conditional authorization procedure would not entail any significant additional effort."[20]

18. We have reviewed the comments in this proceeding and conclude that conditional licensing is a worthwhile concept that would permit applicants to activate their radio stations as expeditiously as possible. We are adopting this procedure substantially as proposed in our *Notice*. As noted below, we are incorporating several additional features that will broaden the scope and contribute to the effective implementation of this procedure. This program will facilitate commercial activities in that it will enable applicants for new stations who elect to do so to order station equipment and begin operations as soon as a frequency coordination recommendation is obtained. Although there may be certain instances, as Teletech maintains, where an applicant is precluded from benefiting from conditional licensing because equipment is not readily available, such instances do not justify foreclosing those licensees that can be served by this program.

### B. *Limitation of the Scope of Conditional Licensing to Stations in the Frequency Bands Below 470 MHz and for One - Way Paging Stations in the 929 - 930 MHz Band*

19. While most commenters were in favor of the concept of extending the Commission's conditional licensing procedures, there was disagreement among those supporting this process concerning the actual scope of the procedure to be implemented. For example, while NABER originally petitioned the Commission to amend its rules to permit conditional operation by applicants for stations on frequencies above 470 MHz, in its comments in this proceeding NABER now favors limiting this procedure to applicants for stations below 470 MHz where frequencies are shared. The E.F. Johnson Company shares NABER's view.

20. On the other hand, SIRSA and the American SMR Network Association, Inc. (ASNA) seek to have conditional licensing extended to virtually all applicants for stations above 470 MHz that do not involve Specialized Mobile Radio Service (SMR) facilities and to SMR applicants requesting additional channels through the intercategory sharing procedures.[21] They maintain that over the past few years many coordinators have made considerable investments and refinements in their coordination software and procedures. Consequently, they assert that recent improvements in coordination techniques have resulted in highly reliable coordination recommendations that pose no greater risk to existing licensees with exclusivity than to shared operations below 470 MHz.

21. Several commenters supporting our proposal's applicability to new stations request that we include additional categories of applications. For example, The American Petroleum Institute (API), SIRSA and AAR state that conditional licensing should apply to modification applications that typically involve requests to move authorized transmitter locations. SIRSA notes that our proposed self-certification procedure for new stations is equally suitable for modification requests. SIRSA believes that inclusion of such modification applications would negate the need for special temporary authority (STA) requests, thereby conserving the Commission's limited resources and simplifying the application process.

22. Motorola and AAR also seek to have applications for assignments and transfers of existing stations included in conditional licensing. Similarly, ASNA suggests that we extend our conditional licensing process to applicants for assignments or transfers of control of existing SMR facilities.

23. As previously noted, our *Notice* in this proceeding initially contemplated adoption of this new conditional licensing procedure for applicants for new stations below 470 MHz. Our inclination to limit this process to these frequencies is based on our assignment policy of maximizing the use of this portion of the spectrum by authorizing these frequencies on a shared basis. Thus, limiting conditional authority to applicants seeking authority below 470 MHz would prevent potential disruption to the operations of existing licensees that have been granted exclusivity in the higher bands. Upon reviewing the comments in this proceeding that addressed the scope of our proposal, we conclude that the considerations concerning the shared nature of assignments below 470 MHz are equally applicable to the one-way paging facilities in the 929-930 MHz band where frequencies are also assigned on a shared basis.[22] We will, therefore, include applicants for these one-way paging stations in our conditional licensing program.

24. We also agree with the comments of API, SIRSA and AAR that suggest that we should include modification applications as well as applications for assignment of authorization or transfer of control below 470 MHz and in the 929-930 MHz band in our conditional licensing procedure. Parties involved in the assignment or transfer of a station license, however, should be aware that conditional authority is temporary in nature and that a permanent change in the licensee does not occur until a license is granted.[23]

25. Notwithstanding the 929-930 MHz band, we decline to include applicants for stations operating in the bands above 470 MHz under our expanded conditional licensing program. In reaching this conclusion we emphasize that

the capacity of coordinators to provide quality coordination recommendations, although important, is not a determining factor in deciding whether to expand conditional licensing where frequencies are exclusively assigned. As stated in the *Notice*, a fundamental prerequisite for increasing speed of service to the land mobile user through the conditional licensing concept is that the applications subject to this procedure must be routine and virtually never challenged.[24] In the 470-512 MHz and 800-900 MHz bands, however, there are additional non-coordination related issues that require Commission review of initial applications and applications for the assignment of authorization or transfer of control, such as a demonstrated need for a requested mobile capacity that warrants exclusive use of a frequency or actual mobile operation sufficient to justify a request for an additional conventional channel or multi-channel trunked facility.[25] Thus, we will not provide for conditional licensing of SMR applicants or for any other private land mobile applicants involving station authorizations in the 470-512 MHz, 806-824/851-866 MHz and 896-901/935-940 MHz bands. In this regard, we believe that we should be conservative in our implementation of conditional licensing where exclusive authorizations are concerned. We may consider expanding this concept in the future as we gain experience in its application.

### C. *Legal Authority*

26. In our *Notice*, we tentatively concluded that implementation of our conditional licensing procedure would be permissible under the Communications Act and solicited comments on this issue. Only three commenters provided their opinions. Teletech generally felt that conditional licensing would confer authority on the coordinators that is contrary to the Act. Teletech, however, failed to provide any specific arguments to support this contention. ASNA and NABER believed that this proposal is a reasonable exercise of the Commission's authority and that it is consistent with the Commission's statutory mandate. NABER, however, expressed reservations that extending conditional licensing to assignments and transfers, even if there are no changes in the operating parameters of the existing station, may be construed as an unauthorized transfer of control in violation of Section 310(d) of the Act.[26]

27. We disagree with Teletech's assertion that our proposal is impermissible under the Act. As noted in the *Notice*, the conditional licensing procedure concept, wherein an "add-on" user may temporarily operate upon filing an application with the Commission, has been affirmed in an unpublished opinion by the United States Court of Appeals for the District of Columbia.[27] Thus, the court has determined that the concept of conditional licensing does not contravene the provisions of Sections 308 and 309(a)[28] of the Act that require the Commission to determine if the grant of each application filed with it is in the public interest, convenience and necessity. Nor is there any legal impediment to conditional licensing for assignments and transfers of control, as NABER suggests, because the provisions of Section 310(d) of the Act[29] governing assignments and transfers provide that such applications should be processed in the same manner as applications for new stations filed in accordance with Section 308 of the Act.

28. Moreover, as we indicated in our *Notice*, we have, on a number of occasions, enacted rules that provide for conditional operation of a private radio station pending the final grant of the application. For example, in 1976, we amended our rules to permit applicants in the Citizens Band Radio Service to engage in temporary operation pending action on their applications.[30] We subsequently adopted a virtually identical procedure for ship stations in the Maritime Services.[31] In 1980, we completed a rule making proceeding authorizing the system of temporary, conditional licenses for "add on" user applications that we now seek to expand.[32] These precedents provide additional support for our statutory authority to establish reasonable classifications for applications, and to enact rules providing for conditionally granting such applications, where such procedures would advance significant public interest objectives.[33]

29. Finally, implementation of this procedure is consistent with the Commission's statutory responsibility to make individual public interest findings when it decides to issue a permanent license authorization or deny the application. In the instant proceeding, the Commission, through the rule making process, is simply implementing a conditional licensing procedure during the interim application processing period for categories of applications, including those for assignments of authorization and transfers of control, that are virtually always granted because they involve no special issues and pose minimal threat to the operations of existing shared users. Such a program is in keeping with the legislative history concerning the provisions of Section 309 of the Act that do not include private land mobile radio service applications among those applications that require thirty day pre-grant public notice.[34] Adoption of this procedure does not compromise the Commission's goal of minimizing the interference potential between stations[35] as this program applies only to shared frequencies. Moreover, conditional operation would enable the Commission to identify the rare instances where harmful interference may result prior to the grant of a permanent license. In such cases, applicants will be advised by the Commission that their conditional authority is terminated. Thus, we conclude that there is a sound legal basis for our action.

### D. *Miscellaneous Issues*

#### 1. *Self - certification concerning antenna site*

30. As a prerequisite to conditional licensing, the applicant must certify that its proposed antenna height is less than 20 feet above the ground or less than 20 feet above the structure, most commonly a building, on which it is mounted. Alternatively, the applicant can certify that it seeks to mount its antenna on a tower structure that has previously been studied by the Federal Aviation Administration (FAA) and cleared by this Commission. Teletech asserts that this element of our procedure is a potential risk to air safety because applicants may incorrectly certify that there are no FAA clearance problems associated with their proposed transmitter sites.

31. This self-certification process, however, does not materially alter our current procedures for ascertaining whether there are outstanding FAA clearance issues. These procedures rely on the applicant to provide accurately the proposed antenna height, the geographic coordinates of the proposed transmitter structure and the call signs of any existing licensees transmitting from the

proposed location. Our experience indicates that this information is readily available to the applicant through its equipment vendor or the coordinator. This information generally is provided accurately by the applicant in response to specific pertinent questions on the application concerning the antenna location and description and the call signs of any existing licensees that are operating at the proposed antenna site. If the applicant wishes to engage in conditional operations, it is the applicant's responsibility to ensure that its proposed transmitter location involves an approved or exempt tower. The Licensing Division will continue to verify the coordinate information provided by the applicant to ensure that it is correct. If any errors are made, the applicant will be advised to remove the antenna and cease operations immediately.

32. In a related matter, in its comments, the Bell Atlantic Telephone Companies (Bell Atlantic) note that our process would require the applicant to self-certify that it has obtained the necessary FAA determination that the proposed transmitter site poses no aviation hazard ("no hazard determination") before filing its application. Bell Atlantic, however, submits that applicants needing a no hazard determination generally apply to the FAA simultaneously with the filing of their applications with the Commission. Thus, Bell Atlantic states that applicants requiring FAA approval of their proposed transmitter sites cannot certify to having obtained such FAA approval when they initially file their applications. Bell Atlantic suggests, therefore, that an applicant should be permitted to certify subsequently that it has obtained the requisite FAA concurrence on a post-filing basis.

33. We agree with Bell Atlantic that applicants that obtain the no hazard determination after filing their license applications with the Commission should be permitted to operate conditionally when they are able to certify that all of the elements required for this conditional licensing process are satisfied. Thus, once the applicant obtains the requisite no hazard determination from the FAA, the applicant can certify that it is eligible for conditional authority and it may commence operation during the remainder of the application processing period. In such instances, post-filing authority to begin operations will be evidenced by the applicant's possession of documentation of FAA approval and the applicant's association of a copy of the filed application and executed certification form with the station records.

**2.** ***Itinerant operation and applications exempt from the frequency coordination process***

34. In our *Notice* we solicited comments concerning whether we should include applicants requesting frequencies for itinerant operations in our conditional licensing process.[36] Only two commenters addressed this issue. Motorola suggests that applications for itinerant stations should be included in this program. NABER, however, opposes conditional licensing for such operations because applicants for itinerant stations are not required to satisfy any frequency coordination procedures to support their requested frequency. NABER believes that allowing applicants that have filed applications that do not require frequency coordination to commence conditional operations prior to Commission review could provide a potential for abuse by encouraging ineligibles to submit itinerant applications for the sole purpose of obtaining immediate authority.

35. Our conditional licensing procedure is based upon the applicant's self-certifications, which the Commission assumes to be accurate. These certifications, as well as the applicant's representation in item 31 of the application concerning the description of its activities that qualify it for itinerant frequencies, provide adequate safeguards for conditional operation. In this regard, conditional operations on itinerant frequencies could not increase the interference potential to existing stations as these frequencies are assigned on a shared, uncoordinated basis. Moreover, ineligible itinerant applicants that engage in conditional operations assume all risks incidental to the purchase and installation of equipment if the Commission ultimately dismisses their applications. Consequently, we have decided to include applicants seeking to utilize itinerant frequencies in our conditional licensing program. We have, however, decided to exclude other categories of applications listed in Section 90.175(f) of the Rules, such as license applications below 25 MHz,[37] as these applications require coordination and approval by the National Telecommunications and Information Administration or other Commission action before a conditional authorization can be allowed.

**3.** ***Mandatory participation***

36. Our proposal contemplated including all categories of applicants in the private land mobile radio services in our new conditional licensing procedure. The Association of American Railroads, however, has requested that Railroad Radio Service applications be excluded from this program. AAR states that railroad communications systems are generally unique and complex and that applicants for such facilities rarely encounter processing delays. Given the complexity of the proposed systems as well as the length of time required to deliver and install the equipment, AAR believes that conditional licensing would not be beneficial in the Railroad Radio Service. SIRSA, in its reply comments, submits that AAR, as a recognized coordinator, is in the best position to know the needs of railroad applicants for expeditious conditional authorization. SIRSA, therefore, supports AAR's request.

37. The possibility that railroad applicants may not generally be able to take advantage of conditional licensing because of the time required for construction is not a reason specifically to exclude them if a situation arises where an applicant can participate. We do not wish, therefore, to exclude eligibles in any land mobile radio service from conditional licensing. All land mobile applicants should be afforded an equal opportunity to benefit from this program. The procedure we are adopting is a voluntary self-certification process. The applicant elects to participate by completing certifications on the conditional licensing application form that evidence that it is eligible for conditional authority. If the applicant chooses to participate, it must also acknowledge on this form that it assumes all risks associated with such conditional operation in the event its application is ultimately dismissed.

**4.** ***"Quiet" zones***

38. The Utilities Telecommunications Council (UTC) recommends that an additional certification should be incorporated in our procedure to reflect that the applicant's proposed station will provide the level of protec-

tion specified in Section 90.177 of the Commission's Rules[38] to the National Radio Astronomy Observatory and other protected sites designated in this rule section.

39. We agree that conditional licensing would be inappropriate if the proposed station posed a potential risk of interfering with the operations of protected sites. We have, therefore, added the requirement that an applicant that seeks conditional authority must also certify that its proposed station affords the level of protection to radio "quiet" zones and monitoring facilities as specified in Section 90.177 of the Commission's Rules.

***5. Conditional licensing application process***

40. We received several comments concerning the nature and contents of the self-certification form required to implement conditional licensing. The American Petroleum Institute recommends that the applicant's certifications should be made on a new form if the applicant seeks conditional authority. API believes that this program will be easier to administer if the Commission develops a separate conditional licensing form instead of modifying the existing Application Form 574. Celpage, Inc. expresses the view that a new form was unnecessary. It recommends that the necessary certifications be made on a certification exhibit as an attachment to the application.

41. With regard to the content of a new form utilized for this procedure, the American Trucking Association, Inc., the Manufacturers Radio Frequency Advisory Committee, Inc. and the Utilities Telecommunications Council voice concern about the potential liability of coordinators for financial loss due to equipment purchase in the event the Commission denies the application. They suggest that the conditional licensing form should contain language clearly advising the applicant that the coordination recommendation is advisory and that the applicant assumes all risks incidental to conditional licensing.

42. We believe that the number of certifications and warnings required for conditional licensing preclude amendment of the existing 574 Application Form. Moreover, extensive amendment of the general application form may cause confusion as conditional licensing is not applicable in all bands. In addition, amendment of Form 574 would not implement conditional licensing for transfers of control as this form is not completed for such filings. Consequently, we have decided to adopt a new 572C Conditional Licensing Application Form similar to the existing 572 Temporary Permit Application Form that has been very effective for implementing our instant "add-on" conditional licensing procedure for users of existing land mobile systems. This approach will standardize the required certifications and highlight the fact that the applicant wishes to commence conditional operations. An executed 572C Form must be kept with the station records and made available for inspection by Commission personnel to evidence that the applicant is eligible for conditional operations.

43. As proposed in the *Notice*, the Form 572C will contain an express provision warning the applicant that conditional authority may be terminated by the Commission at any time without a right to a hearing. The warning will include a reference to the provisions of Section 90.175(d) of the Rules that provide that a frequency coordination recommendation is advisory in nature and that the coordination recommendation does not assure that the Commission will grant the application for operation on the recommended frequency. Additionally, the application will contain an acknowledgment by the applicant that it must assume all risks, including monetary loss due to equipment purchase, in the event conditional authority is terminated or the application is subsequently dismissed or denied. Finally, conditional authority is based upon the applicant's pending application. Consequently, conditional authority will cease immediately if the application is not acceptable for filing for any reason, including the submission of an insufficient application filing fee.

44. As indicated in the *Notice*, Form 572C will contain a section requiring the applicant to specify a temporary call sign consisting of the applicant's seven digit local telephone number after the letters "WT". This temporary call sign will be used by the Commission to identify and locate a station in the event conditional operations result in interference to existing stations. The prefix "WT" as part of a temporary call sign is designated in Section 2.302 of the Commission's Rules[39] to distinguish Part 90 stations that are operating under the temporary permit provisions of Section 90.159 of the Rules. Conditional operations by applicants for modification, assignment or transfer of existing stations, however, will be identified by the station's call sign.

## IV. DECISION

45. In view of the above, the Commission concludes that adoption of rules, as set forth in Appendix B, implementing a conditional authorization procedure in the private land mobile radio services for stations below 470 MHz and one-way paging facilities in the 929-930 MHz band, where frequencies are assigned on a shared basis, is in the public interest. In these frequency bands, this procedure will apply to applications for new stations and to applications for modification, assignment or transfer of existing stations. This system of licensing will expedite communications service to the public without compromising the Commission's ability to determine if the applicant is eligible to receive a permanent license grant or if permanent authorization of the proposed station would pose a risk of harmful interference to existing stations.

46. Implementation of this conditional licensing procedure is subject to approval by the Office of Management and Budget of the new 572C Application Form. Sufficient supplies of this new form must be obtained to satisfy initial demand. Therefore, in order to allow for an adequate period of time to accomplish these goals, unless the public is advised to the contrary, the Rules we adopt herein will become effective June 30, 1990.

## V. FINAL REGULATORY FLEXIBILITY ANALYSIS

47. The Commission is adopting this *Report and Order* to implement a procedure for granting conditional authority to applicants for private land mobile radio stations for operation on shared frequencies whose applications can be routinely granted and are virtually never challenged or denied. No comments were received that specifically addressed the Initial Regulatory Flexibility Analysis contained in our *Notice* pursuant to 5 U.S.C. § 603. This action will promote efficient spectrum use by providing a procedure for private radio service eligibles that will allow the commencement of station operations during the application processing period, in specified fre-

quency bands, upon the applicant's filing of a properly completed application that satisfies the Commission's frequency coordination requirements.

48. The only alternatives to this action suggested by the commenters concerned the scope of this program. Although several commenters urged us to expand the scope of this procedure to the maximum extent possible, we have decided to limit this process to bands where frequencies are shared rather than exclusively assigned in a given area to avoid potential disruption to existing stations that have been granted exclusivity.

## VI. PAPERWORK REDUCTION ACT STATEMENT

49. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980. Although our action requires completion of a new Form 572C containing the applicant's certifications that it is eligible for conditional licensing, completion of this form is voluntary and is only required if the applicant wishes to participate in this program. Utilization of this new form will be subject to approval by the Office of Management and Budget as prescribed by the Act.

## VII. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 301, 303(r), 309 and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 301, 303(r), 309, and 332(a), Parts 1, 2 and 90 of the Commission's Rules, 47 C.F.R. Parts 1, 2 and 90, ARE AMENDED as set forth in Appendix B below effective **June 30, 1990.**

51. IT IS FURTHER ORDERED that the February 17, 1989, Motion for Suspension or Termination filed by Teletech, Inc. and the August 28, 1989, Motion for Termination filed by Merrill T. See ARE DENIED.

52. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## APPENDIX A

### COMMENTS

American Petroleum Institute

American SMR Network Association, Inc.

American Trucking Association, Inc.

Association of American Railroads

Bell Atlantic Telephone Companies

Celpage, Inc.

E.F. Johnson Company

Forest Industries Telecommunications Manufacturers Radio Frequency Advisory Committee, Inc.

Motorola, Inc.

National Association of Business and Educational Radio, Inc.

Merrill T. See

Special Industrial Radio Service Association, Inc.

Teletech, Inc.

Utilities Telecommunications Council

### REPLY COMMENTS

American SMR Network Association, Inc.

Association of American Railroads

National Association of Business and Educational Radio, Inc.

Merrill T. See

Special Industrial Radio Service Association, Inc.

Teletech, Inc.

Utilities Telecommunications Council

## APPENDIX B

Parts 1, 2, and 90 of the Commission's Rules are amended as follows:

### A. Part 1 - Practice and Procedure

1. The authority citation for Part 1 continues to read as follows:

**Authority : Sections 4, 303, 48 Stat. 1066, 1082, as amended, 47 U. S. C. §§ 154, 303; Implement 5 U. S. C. § 552, unless otherwise noted.**

2. Section 1.922 is amended by adding a new FCC Form and Title to read as follows:

**§ 1. 922 Forms to be used**

| FCC Form | Title |
|---|---|
| * * * * * | |
| 572C | Conditional Temporary Authorization to Operate a Part 90 Radio Station |
| * * * * * | |

3. Section 1.925 is amended by redesignating current paragraph (i) to read paragraph (j) and by adding new paragraph (i) to read as follows:

**§ 1. 925 Application for special temporary authorization, temporary permit or temporary operating authority**

* * * * *

(i) An applicant for an itinerant station license, an applicant for a new private land mobile radio station license in the frequency bands below 470 MHz and in the one-way paging 929-930 MHz band or an applicant seeking to modify or acquire through assignment or transfer an existing station below 470 MHz or in the one-way paging 929-930 MHz band may operate the proposed station during the pendency of its application for a period of up to 180 days under a conditional permit. Conditional operations may commence upon the filing of a properly completed formal application that complies with § 90.127 if the application, when frequency coordination is required, is accompanied by evidence of frequency coordination in accordance with §§ 90.175 and 90.176. Operation under such a permit is evidenced by retaining with the station records the original conditional licensing 572C Certification Form containing the certifications that satisfy the provisions of § 90.159(b).

(j) An applicant for a General Mobile Radio Service system license, sharing a multiple-licensed base station used as a mobile relay station, may operate the system for a period of 180 days, under a Temporary Permit, evidenced by a properly executed certification made on FCC Form 574-T, after mailing FCC Form 574 to the Commission.

**B. Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations**

1. The authority citation for Part 2 continues to read as follows:

**Authority: Sections 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U. S. C. §§ 154, 302, 303, 307, unless otherwise noted.**

2. Section 2.302 is amended by adding a new class of station, composition of call sign, and call sign block to the table of call signs to read as follows:

**§ 2. 302 Call Signs**

* * * * *

| Class of Station | Composition of Call Sign | Call Sign Blocks |
|---|---|---|
| * * * * * | | |
| Part 90 conditional permit | 2 letters, 7 digits | WT plus local telephone number |

* * * * *

**C. Part 90 - Private Land Mobile Radio Services**

1. The authority citation for Part 90 continues to read as follows:

**Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U. S. C. §§ 154, 303, unless otherwise noted.**

2. 47 C.F.R. § 90.159 is amended by revising its title and by designating the existing text of this rule section as paragraph (a) and adding new paragraphs (b), (c) and (d) as follows:

**§ 90. 159 Temporary and Conditional Permits**

(a) * * *

(b) An applicant proposing to operate a new private land mobile radio station or modify an existing station below 470 MHz or in the one-way paging 929-930 MHz band that is required to submit a frequency recommendation pursuant to §§ 90.175(a)-(e) may operate the proposed station during the pendency of its application for a period of up to 180 days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127 if the application is accompanied by evidence of frequency coordination in accordance with §§ 90.175 and 90.176, and provided that the applicant certifies that the following conditions are satisfied:

(1) The proposed station location is south of Line A or west of Line C as defined in § 90.7.

(2) The proposed antenna structure has been previously studied by the Federal Aviation Administration and determined to pose no hazard to aviation safety as required by § 17.4 of the Commission's Rules; or the proposed antenna or tower structure does not exceed 6.1 meters (20 feet) above ground level or above an existing man-made structure (other than an antenna structure), if the antenna or tower has not been previously studied by the Federal Aviation Administration and cleared by the FCC.

(3) The grant of the application does not require a waiver of the Commission's Rules.

(4) The applicant has determined that the proposed facility will not significantly affect the environment as defined in § 1.1307.

(5) The applicant has determined that the proposed station affords the level of protection to radio "quiet" zones and monitoring facilities as specified in § 90.177.

(6) The applicant has submitted an application to the Commission stating the frequency the applicant intends to use and that the frequency coordination requirements specified in §§ 90.175 and 90.176 for selection and use of this frequency have been satisfied.

(c) An applicant proposing to operate an itinerant station, or, an applicant seeking the assignment of authorization or transfer of control of a license for an existing station operating below 470 MHz, or in the 929-930 MHz band, may operate the subject station during the pendency of the application for a period not to exceed 180 days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127. Conditional authority ceases immediately if the application is returned by the Commission because it is not acceptable for filing. All other categories of applications listed in § 90.175(f) that do not require evidence of frequency coordination are excluded from the provisions of this rule section.

(d) A conditional authorization pursuant to (b) and (c) above is evidenced by retaining the original executed conditional licensing 572C Certification Form with the station records. Conditional authorization does not prejudice

any action the Commission may take on the subject application. Conditional authority is accepted with the express understanding that such authority may be modified or cancelled by the Commission at any time without hearing if, in the Commission's discretion, the need for such action arises. Consistent with § 90.175(d), the applicant assumes all risks associated with operation under conditional authority, the termination or modification of conditional authority, or the subsequent dismissal or denial of its application. Authority reverts back to the original licensee if an assignee or transferee's conditional authority is cancelled.

(e) The transmissions of new stations operating pursuant to conditional authority shall be identified by a temporary call sign consisting of the prefix "WT" followed by the applicant's local seven digit business telephone number as provided in § 2.302. Transmissions by applicants for the modification, assignment of authorization or transfer of control of an existing station shall be identified by the station's call sign.

* * * * *

## FOOTNOTES

[1] Notice of Proposed Rule Making, PR Docket No. 88-567, 4 FCC Rcd 461 (1989), 54 FR 1733 (January 17, 1989).

[2] For frequencies between 25 MHz and 470 MHz and frequencies in the 929-930 MHz band the Commission's current frequency coordination process requires a statement from the applicable frequency coordinator recommending the most appropriate frequency. 47 C.F.R. §§ 90.175(a) and (c). The Commission is currently reexamining its frequency coordination policy and has proposed to allow "direct access applications" as an alternative to applications filed pursuant to the recommendation of a certified coordinator. Such applicants would be required to send copies of their applications to the pertinent coordinators. In addition they would be required to list all co-channel users within a 75 mile radius of the proposed station and to explain why they selected the requested frequency. See Notice of Proposed Rule Making, PR Docket No. 88-548, 4 FCC Rcd 6325 (1989). See *also* Private Radio Bureau, Report to the Commission on Frequency Coordination in the Private Land Mobile Radio Services, PR Docket No. 88-548 (December 5, 1988) (available in the Commission's Public Reference Room). On February 17, 1989, Teletech, Inc. filed a Motion for Suspension or Termination of this conditional licensing rule making proceeding pending the outcome of our reexamination of our frequency coordination procedures. Merrill T. See filed a similar Motion for Termination on August 28, 1989. We are denying the Teletech and See motions because we contemplate that the conditional licensing procedure adopted in this proceeding will also apply to any new alternative methods of frequency coordination the Commission may adopt in PR Docket No. 88-548.

[3] Line A is an imaginary line within the United States approximately paralleling the Canadian border, north of which Commission coordination with Canadian authorities in the assignment of frequencies is generally required. Similarly, Line C is an imaginary line paralleling the Alaska and Canadian border, east of which requires Canadian coordination. 47 C.F.R. § 90.7.

[4] Proposed antenna structures that pose a possible hazard to air navigation require evaluation by the Federal Aviation Administration and approval by this Commission. 47 C.F.R. § 17.4(f).

[5] If the applicant's proposed facility may have a significant effect upon the environment, the Commission's Rules require the applicant to submit an Environmental Assessment in support of the application. 47 C.F.R. §§ 1.1308, 1.1311. Applications in which the applicant has not certified that the facility will not significantly affect the environment would be precluded from using the conditional licensing procedure. Precluding such applications from this program is consistent with our Notice of Proposed Rule Making in Gen. Docket No. 88-387, 3 FCC Rcd 4991 (1988), in which we proposed amending Section 1.1312 of the Rules, 47 C.F R. § 1.1312, to require consideration of environmental factors before an applicant constructs facilities where a construction permit is not required.

[6] 47 C.F.R. § 90.177. This condition was not included as an element of our initial conditional licensing proposal. It was added as a result of suggestions made in comments in this proceeding. *See* para. 39 *infra*.

[7] Although this certification was not in our original proposal, it has been included to ensure that the applicant is aware that it must satisfy the Commission's frequency coordination requirements before engaging in conditional operations.

[8] SIRSA and NABER are trade organizations representing Special Industrial and Business Radio Services licensees, respectively. Although they initially requested conditional licensing for frequencies below 800 MHz, which includes the 470-512 MHz band where exclusive use is permitted, we are restricting conditional authority to frequencies below 470 MHz and to one-way paging in the 929-930 MHz band where licenses are granted on a shared rather than exclusive basis. *See* paras. 24-26 *infra*.

[9] *See* Amendment of Parts 1, 2 and 90 of the Commission's Rules and Regulations to implement a system of temporary licensing for multiple licensed mobile relay systems operating in the Business Radio Service in the 450-470 MHz band. Report and Order, PR Docket No. 79-338, 81 FCC 2d 373 (1980).

[10] The frequency coordination procedures are contained in Section 90.175 of the Rules, 47 C.F.R. § 90.175.

[11] Conditional licensing will also be available to applicants in instances where new frequency coordination recommendations are not required such as applications for the assignment or transfer of control of an existing station.

[12] *See* n.2 *supra*.

[13] As noted in our *Notice*, in reviewing the application for completeness, the coordinator is not exercising any decisional responsibility regarding the applicant's eligibility. The applicant's eligibility is based upon its representations on the application form, which the Commission presumes are truthful and accurate. *See* Sea Island Broadcasting, 60 FCC 2d 146 (1976); Nick J. Chaconas, 28 FCC 2d 231 (1971), *recon. denied*, 35 FCC 2d 698 (1972).

[14] Most, if not all, coordinators currently notify the applicant when they have forwarded the application and frequency coordination recommendation to the Commission. We anticipate that all coordinators will continue to provide such notice. Our conditional licensing procedure, therefore, should not place any additional burden or responsibility on the coordinator with respect to this notification.

[15] In this regard, we noted that the Commission's Rules expressly advise applicants that a frequency coordination recommendation is advisory in nature and that it is not an assurance that the Commission will grant a license for operation on that frequency. The purchase of equipment or other expenditure of money, therefore, would not be a factor in our final disposition of an application. 47 C.F.R. § 90.175(d). A grant of

conditional authority would not create any right beyond the terms, conditions and periods of the authorization. 47 U.S.C. § 301.

[16] Private land mobile stations are not subject to the 180 day limitation for the duration of temporary authority specified by Section 309(f) of the Act, 47 U.S.C. § 309(f). We conclude, however, that a maximum 180 day term for conditional authorization is a reasonable period of time to allow for final disposition of an application by this Commission. It is also the maximum term permissible under our current temporary permit procedures for "add-on" users. *See* Section 90.159 of our Rules.

[17] 47 C.F.R. § 2.302.

[18] A complete list of the parties filing comments and reply comments is attached as Appendix A to this Report and Order. With the exception of the reply comments of the Association of American Railroads (AAR) all comments in this proceeding were timely filed. In the interest of obtaining a full record with a broad range of views, we are accepting AAR's late filing.

[19] Notice, 4 FCC Rcd at 464.

[20] SIRSA reply comments at 15, n.2.

[21] The Commission's inter-category sharing provisions are contained in Section 90.621(g) of the Commission's Rules, 47 C.F.R. § 90.621(g).

[22] SIRSA, for example, suggested that we include frequencies within the 929-930 MHz band in our conditional licensing procedure. *See* SIRSA reply comments at 6.

[23] In the event conditional authority is terminated, authority to operate the station will revert back to the original licensee. Parties are advised to address this eventuality in the terms of their contractual agreements.

[24] Notice, 4 FCC Rcd at 462 and 464.

[25] *See e.g.*, Notice of Proposed Rule Making, Docket No. 18261, 14 FCC 2d 297 (1968); First Report and Order, Docket No. 18261, 23 FCC 2d 325 (1970); Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974); Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975); *aff'd sub nom.* National Association of Regulatory Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir.) *cert. denied*, 425 U.S. 992 (1976); and 47 C.F.R. §§ 90.313, 90.631 and 90.633.

[26] 47 U.S.C. § 310(d).

[27] The court concluded that "the Report and Order adopting rules and procedures to implement this [temporary licensing] scheme . . . does not conflict with any of the explicit requirements of the Communications Act." Telocator Network of America v. FCC, No. 80-2181 (D.C. Cir. August 14, 1980).

[28] 47 U.S.C. §§ 308 and 309(a).

[29] 47 U.S.C. § 310(d).

[30] *See* General Rules and Regulations, Citizens Radio Service, 41 Fed. Reg. 15849 (1976).

[31] Amendment of Parts 1, 81 and 83 of the Commission's Rules to implement a system of temporary authorizations for ship stations in the Maritime Services, 70 FCC 2d 863 (1979).

[32] *See* note 9 *supra*.

[33] The Commission is authorized to adopt reasonable classifications of applications to effectuate the licensing process. 47 U.S.C. § 309(g).

[34] In discussing the § 309 notice provisions, Congress recognized that the routine nature of some applications does not require public notice of filing and encouraged the Commission to develop procedures that would permit such applications to be "granted as quickly and expeditiously as possible." Hearings on S.1898 before a Subcommittee of the Committee On Interstate and Foreign Commerce, House of Representatives, 86th Congress, 2nd Session, at 135 (April 12, 1960).

[35] 47 U.S.C. §§ 303(f),(g) and (r).

[36] Itinerant operation is operation of a radio station at unspecified locations for varying periods of time. 47 C.F.R. § 90.7. Examples of commercial entities that are itinerant in nature are construction and road maintenance companies. The frequencies allocated for itinerant use are specified in Sections 90.73(c)(4) and 90.75(b)(3) of the Commission's Rules, 47 C.F.R. §§ 90.73(c)(4) and 90.75(b)(3).

[37] 47 C.F.R. §§ 90.263, 90.264 and 90.266 govern the assignment and permissible use of these frequencies.

[38] 47 C.F.R. § 90.177.

[39] 47 C.F.R. § 2.302.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-616**

In the Matter of

Amendment of Section 73.202(b) RM-6075
Table of Allotments
FM Broadcast Stations
(Emporia, Kansas)

**MEMORANDUM, OPINION & ORDER**
**(Proceeding Terminated)**

**Adpoted: November 8, 1989; Released: November 24, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it a Petition for Reconsideration[1] filed by New West Radio, Inc. (New West). New West seeks reconsideration of the Commission's action returning as unacceptable its March 21, 1988, counterproposal and comments proposing the substitution of Channel 241C2 for Channel 240A at Derby, Kansas, and modification of its license for Station KRZZ-FM. To accommodate the new channel at Derby, substitutions are required at Augusta and Herington, Kansas.

2. New West has since filed a separate petition requesting the substitution of Channel 242C2 for Channel 240A at Derby, Kansas, and modification of its license for Station KRZZ-FM. That request involved different substitutions at other communities in order to accommodate the update. The *Report and Order* in MM Docket 89-54, 4 FCC Rcd 5741 (1989), granted that request and is no longer subject to review. In light of these facts, New West has filed comments requesting the withdrawal and dismissal of its Petition for Reconsideration.

3. In view of the foregoing, IT IS ORDERED, That the petition of New West Radio, Inc., IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy & Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] Public Notice was given on May 25, 1988, Report No. 1730.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-528**

In the Matter of

Amendment of Section 73.202(b), RM-7045
Table of Allotments,
FM Broadcast Stations.
(Hatteras, North Carolina)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: November 8, 1989; Released: November 27, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Heart of Dixie Broadcasting, Inc. (petitioner) requesting the allotment of Channel 232A to Hatteras, North Carolina, as its second local FM service. Petitioner states that it will apply for the channel, if allotted. Channel 232A can be allotted to Hatteras in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 232A to Hatteras, North Carolina, since it could provide the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Hatteras, North Carolina | 248C2 | 232A, 246C1[2] |

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **January 18, 1990,** and reply comments on or before **February 2, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Toni T. Rinehart, President
Heart of Dixie Broadcasting, Inc.
2557-E Mountain Lodge Circle
Birmingham, Alabama 35216
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] The coordinates for this allotment are North Latitude 35-12-54 and West Longitude 75-41-30.

[2] The Commission, at the request of Pamlico Sound Company, Inc., has proposed the substitution of Channel 246C1 for 248C2 at Hatteras, and the modification of its construction permit accordingly. *See* 4 FCC Rcd 5351 (1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-450**

In the Matter of

Amendment of Section 73.202(b), RM-6403
Table of Allotments,
FM Broadcast Stations.
(Moulton, Alabama)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 8, 1989; Released: November 27, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5701 (1988), proposing the allotment of Channel 276A to Moulton, Alabama, as that community's first local FM broadcast service. Moulton Broadcasting Company, Inc. ("MBC"), the original petitioner, failed to file comments restating an intention to apply for the channel, if allotted. L. Lynn Henley filed comments and stated an intention to apply for the channel, if allotted.

2. In view of the above, we believe the public interest would be served by allotting Channel 276A to Moulton, Alabama, based on the expression of interest shown by L. Lynn Henley, since it could provide that community with its first local FM broadcast service.

3. A staff engineering analysis confirms that Channel 276A can be allotted to Moulton, Alabama, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 5.1 kilometers (3.2 miles) north of the community to avoid short-spacing to Channel 276C2, Columbus, Mississippi.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 11, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Moulton, Alabama | 276A |

5. The window period for filing applications for Channel 276A at Moulton, Alabama will open on **January 12, 1990,** and close on **February 12, 1990.**

6. Accordingly, IT IS ORDERED, That the petition of Moulton Broadcasting Company ("MBC") requesting the allotment of Channel 276A to Moulton, Alabama, IS HEREBY DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Ordee Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTE**

[1] Coordinates for Channel 276A at Moulton, Alabama, are 34-31-10 and 87-15-48.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-529**

In the Matter of

Amendment of Section 73.202(b), RM-6947
Table of Allotments,
FM Broadcast Stations.
(Wynne, Arkansas)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 8, 1989; Released: November 27, 1989**

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of East Arkansas Broadcasters, Inc. (petitioner), licensee of Station KWYN-FM, Channel 224A, Wynne, Arkansas, seeking the substitution of Channel 223C3 for Channel 224A and modification of its license to specify the higher power channel. Petitioner states its intention to apply for Channel 223C3 if allotted to Wynne.

2. A staff engineering analysis of the proposal reveals that Channel 223C3 can be allotted to Wynne at the petitioner's suggested site 6.7 kilometers (4.1 miles) east[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 223C3 for Channel 224A at Wynne, Arkansas. As requested, we also propose to modify the Class A license of Station KWYN-FM to specify operation on Channel 223C3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 223C3 at Wynne.

4. Accordingly, in order to provide Wynne with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Wynne, Arkansas | 224A | 224C3 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 18, 1990,** and reply comments on or before **February 2, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Eugene T. Smith, Esq.
715 G Street, S.E.
Washington, DC 20003

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] Reference coordinates at the petitioner's suggested site for Channel 223C3 at Wynne are 35-11-59 and 90-43-23.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-530**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6901 |
| Table of Allotments, | RM-6948 |
| FM Broadcast Stations. | |
| (Ashdown and DeQueen, Arkansas) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 8, 1989; Released: November 27, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration are two separately-filed and mutually exclusive petitions for rule making. KARQ Radio, Inc. (KARQ), licensee of Station KARQ(FM), Channel 221A, Ashdown, Arkansas, seeks the substitution of Channel 223C3 for channel 221A at Ashdown and modification of its license to specify operation on the higher-powered channel (RM-6901). In order to accommodate the proposal at its present site, KARQ requests the substitution of Channel 225A for Channel 224A at DeQueen, Arkansas, licensed to Jay W. and Anne W. Bunyard (Bunyard), for Station KDQN-FM, and modification of its license to specify the alternate Class A channel. KARQ states that it will apply for Channel 223C3 if allotted to Ashdown, and reimburse Bunyard for the reasonable costs associated with the change in channel.

2. Bunyard separately seeks the substitution of Channel 225C3 for Channel 224A at DeQueen at its present site, and modification of its license for Station KDQN-FM to specify operation on the higher-powered channel (RM-6948). Bunyard states its intention to apply for Channel 225C3 if allotted to DeQueen.

3. Channel 223C3 can be allotted to Ashdown at the licensed site of Station KARQ(FM),[1] in compliance with the Commission's minimum distance separation requirements, provided that Channel 225A is substituted for Channel 224A at DeQueen at the licensed site of Station KDQN-FM.[2] Alternatively, Channel 225C3 can be substituted for Channel 224A at DeQueen at the present transmitter site of Station KDQN-FM. However, both requests for modification to specify Class C3 facilities cannot be accommodated in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. The proposals are 42 kilometers apart whereas 43 kilometers is required between second adjacent Class C3 channels.

4. We believe the public interest would be served by seeking further comment on these proposals. KARQ and Bunyard may wish to consider the use of different sites to avoid the spacing deficiency, thereby providing the opportunity for improved service to each. In the event KARQ and Bunyard cannot agree to the use of a restricted site to accommodate the proposals, the site preferences will be considered on a comparative basis. Therefore, in order to make a determination as to which proposal would better serve the public interest, we are providing each proponent an opportunity to demonstrate in comments why it should receive the higher class allotment. In this regard, the parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In particular, the parties should submit a gain area study showing the population and square miles of the increased area to be served. *See, Greenup, KY and Athens, OH*, 2 FCC Rcd 4319 (1987), for the methodology to be used in these studies.

5. In view of the above, we alternatively propose to modify either KARQ's license for Station KARQ(FM) at Ashdown, Arkansas, to specify operation on Channel 223C3, or Bunyard's license for Station KDQN-FM at DeQueen, Arkansas, to specify operation on Channel 225C3 or 225A, in the event it should not be preferred on a comparative basis. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest nor require KARQ or Bunyard to demonstrate the availability of an additional equivalent class of channel at their respective communities.

6. Accordingly, we seek comments on the alternative proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| | **OPTION I** | |
| Ashdown, Arkansas | 221A,280A | 223C3,280A |
| DeQueen, Arkansas | 224A | 225A |
| | **OPTION II** | |
| DeQueen, Arkansas | 224A | 225C3 |

7. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Bunyard Broadcasting, Inc., licensee of Station KDQN-FM, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 225A in lieu of Channel 224A.

8. Pursuant to Section 1.87 of the Commission's Rules, Bunyard Broadcasting, Inc., may, not later than **January 18, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Bunyard Broadcasting, Inc. to furnish additional information. If Bunyard Broadcasting, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Bunyard Broadcasting, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the licensee of Station KDQN-FM, as follows: Jay W. and Anne W. Bunyard (Bunyard Broadcasting, Inc.). P.O. Box 311, DeQueen, AR 71832.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **January 18, 1990,** and reply comments on or before **February 2, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

David M. Silverman, Esq.
Robert G. Scott, Jr., Esq.
Cole, Raywid & Braverman
1919 Penn. Ave., N.W.
Suite 200
Washington, DC 20006
(Counsel for KARQ Radio, Inc.)

and

Eugene T. Smith, Esq.
715 G Street, SE
Washington, DC 20003
(Counsel for Bunyard Broadcasting, Inc.)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Coordinates at the licensed site of Station KARQ(FM) are 33-41-56 and 94-07-24.

[2] Coordinates at the licensed site of Station KDQN-FM are 34-01-57 and 94-19-43.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-531**

In the Matter of

Amendment of Section 73.202(b), RM-6949
Table of Allotments,
FM Broadcast Stations.
(Helena, Arkansas)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 8, 1989; Released: November 27, 1989**

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Delta Broadcasting, Inc. (petitioner), licensee of Station KCRI-FM, Channel 276A, Helena, Arkansas, seeking the substitution of Channel 276C3 for Channel 276A, and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 276C3 can be allotted to Helena at the petitioner's specified site 2.6 kilometers (1.6 miles) northwest[1] of the community, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 276C3 for Channel 276A at Helena, Arkansas. In accordance with established Commission policy, we will propose to modify the Class A permit of Station KCRI-FM, as requested by petitioner, in the event Channel 276C3 is substituted for Channel 276A at Helena, Arkansas. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 276C3 at Helena.

4. Accordingly, in order to provide Helena with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Helena, Arkansas | 233A,276A | 233A,276C3 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 18, 1990,** and reply comments on or before **February 2, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
2033 M Street, NW
Suite 207
Washington, DC 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] Coordinates at the petitioner's specified site are 34-32-50 and 90-36-40.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

MCI INTERNATIONAL, INC., and
RCA GLOBAL COMMUNICATIONS, INC.,
Complainants,

v. File No. E-89-135

CONTEL ASC,
Defendant.

AMERICAN SATELLITE COMPANY, and
CICI, INC.,
Complainants,

v. File No. E-89-139

MCI INTERNATIONAL, INC., and
RCA GLOBAL COMMUNICATIONS, INC.,
Defendants.

## ORDER

**Adopted: November 20, 1989; Released: November 27, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On March 6, 1989, MCI International, Inc., and RCA Global Communications, Inc., (hereinafter referred to collectively as "MCII") filed a formal complaint against Contel ASC alleging certain statutory and tariff violations associated with MCII's past use of the earth station at Santa Paula, California (File No. E-89-135). On April 4, 1989, American Satellite Company, d/b/a Contel ASC, and CICI, Inc., d/b/a Contel ASC, International Division (collectively referred to as "CICI")[1] filed a complaint against MCI International, Inc., and RCA Global Communications, Inc., also involving past use of the same earth station (File No. E-89-139). Numerous other pleadings were filed in both complaint proceedings, including a cross complaint filed by CICI against MCII in File No. E-89-135 and a counterclaim filed by MCII against CICI in File No. E-89-139.

2. The parties to the above-captioned complaints have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaints. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On November 9, 1989, counsel for MCII filed motions to dismiss its complaint (File No. E-89-135) and counterclaim (File No. E-89-139). On November 13, 1989, counsel for CICI filed motions to dismiss its cross complaint (File No. E-89-135) and complaint (E-89-139). We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the motions to dismiss the above-captioned complaints (including the cross complaint and counterclaim) ARE GRANTED.

4. IT IS FURTHER ORDERED that these complaints (File Nos. E-89-135 and E-89-139) ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

### FOOTNOTE

[1] At the time the complaints were filed, Contel ASC was the parent of CICI. Since then CICI has been acquired by IDB Communications Group.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

ATLANTIC TELE-NETWORK COMPANY File No. I-T-C-89-130

Application for authority to operate as an international resale carrier.

## MEMORANDUM OPINION, AUTHORIZATION AND CERTIFICATE

**Adopted: November 14, 1989; Released: November 27, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application filed on June 28, 1989 and amended on July 11, 1989 by Atlantic Tele-Network Company (ATN) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. Virgin Islands and various overseas points. The application was placed on public notice on July 12, 1989. Comments were filed by American Telephone and Telegraph Co. (AT&T) on August 11, 1989. ATN filed a Reply to AT&T's comments on August 23, 1989.

2. AT&T does not oppose the grant of ATN's application. It suggests that because ATN is the parent of and shares officers with Vitelco, the local exchange carrier (LEC) for the U.S. Virgin Islands, and because the application is "vague" concerning separation and accounting requirements applicable to such carriers, the Commission should specify appropriate safeguards to ensure against cross-subsidization. Because of the potential for Vitelco improperly subsidizing or otherwise favoring its parent's interexchange operations, AT&T believes that cost allocation and non-structural safeguards similar to those imposed in Puerto Rico in CC Docket No. 86-309 should also be imposed on ATN and Vitelco.[1] In addition, because of the corporate relationship and the unavailability of Feature Group D access in the U.S. Virgin Islands, AT&T states that ATN and Vitelco will have the ability and incentive to discriminate in providing access to the interexchange carrier whose underlying service ATN resells. Thus, AT&T believes that ATN and Vitelco should be subject to the following conditions: (a) AT&T must receive access arrangements at least as desirable as its current access, and (b) to the extent that access arrangements are unequal, AT&T, as the traditional off-islands carrier, must receive superior access to that of ATN's off-islands interexchange operations.

3. In its Reply, ATN views the imposition of the conditions proposed by AT&T as burdensome and unnecessary. ATN states that it has been quite specific about the separation and accounting mechanisms that are in place to ensure that there will be no cross-subsidization or improper favoritism. Specifically, ATN states that (1) it will maintain separate books of account, (2) it will not own any switching or transmission facilities jointly with Vitelco, and (3) to the extent that ATN uses any of Vitelco's tariffed services, it will obtain such services pursuant to published tariffs. Based on these representations, ATN believes that it should be classified as non-dominant in light of previous Commission orders.

4. ATN believes that the factual predicate for the imposition of safeguards in Puerto Rico is different from the situation in the U.S. Virgin Islands. Specifically, ATN cites PRTC's size, its proposed facilities ownership and the size of the off-island toll market in Puerto Rico as factors which influenced the Commission to impose certain requirements with respect to PRTC. According to ATN, such safeguards are unnecessary in this situation. In support of this contention, ATN states that the Commission decided to impose structural safeguards in connection with CC Docket No. 86-309 in large part because PRTC proposed non-separated and fully integrated off-island and local intra-island operations. ATN notes that the Commission has acknowledged that the use of a separate corporate entity for the provision of interexchange service by a LEC reduces the need for other safeguards to ensure fair competition. ATN also states that the requirement for PRTC to develop a Customer Proprietary Network Information (CPNI) plan was based, in part, on PRTC's proposed provision of both local and interexchange service without the creation of a separate subsidiary.

5. With respect to the access conditions proposed by AT&T, ATN states that since AT&T will receive the same premium access it has always received in the U.S. Virgin Islands after grant of the instant application, AT&T's first proposed condition is unnecessary. As to AT&T's second proposed condition, ATN does not believe that the Commission should mandate that premium access is only available to AT&T. ATN states that by providing premium access to AT&T as well as other carriers, to the extent technically feasible in an non-equal access environment, Vitelco can enhance service reliability and long distance communications capacity for its local subscribers.

## DISCUSSION

6. After review of the instant application and pleadings, we find that its grant will serve the public interest subject to certain conditions set forth below. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[2] We find that the market will support additional carriers and that the added competition will be in the public interest. [3] We also conclude that based on the representations made by ATN in its application and reply, it should be classified as non-dominant in the provision of the proposed services.

7. *Non - dominant status*. ATN believes that it should be accorded non-dominant status in the provision of off-islands service on a resale basis. We agree. According to ATN, (a) it will maintain separate books of account; (b) it will not own any switching or transmission facilities jointly with Vitelco; and (c) to the extent that it uses any of Vitelco's tariffed services, it will obtain services pursuant to published tariffs. These representations conform to the guidelines specified in the *Fifth Report and Order* in the *Competitive Carrier Proceeding* concerning the provision of interexchange services by affiliates of LECs.[4] The Com-

mission relied on similar statements made by the Puerto Rico Telephone Authority (PRTA) in finding that PRTA's separate subsidiary, Telefonica Larga Distancia de Puerto Rico (TLD), would be non-dominant in the provision of international message telephone service off the island of Puerto Rico.[5] AT&T's statement that ATN shares officers with Vitelco does not alter this conclusion. The Commission has stated that "an affiliate qualifying for non-dominant treatment is not necessarily structurally separated from an exchange telephone company in the sense ordered in the Second Computer Inquiry . . . " The Commission noted that fully-separated personnel and marketing staffs--required in the Commission Order in the Second Computer Inquiry-- are not part of the requirements for affiliates to be found non-dominant in context of the *Competitive Carrier Proceeding*.[6]

8. *Access conditions*. AT&T has argued that in the absence of Feature Group D access in the U.S. Virgin Islands, the same interim access conditions imposed in CC Docket No. 86-309 should also be imposed here. We agree. In the *Report and Order*, the Commission determined that in order for the public to benefit fully from PRTC's entry into off-island markets under interim, pre-equal access arrangements, PRTC had to satisfy the following conditions: (1) AAC&R (now AT&T-PR) must receive access arrangements at least as desirable as its current access; and (2) to the extent that access arrangements are unequal, AAC&R as the traditional off-island carrier, must receive the superior access and all other authorized carriers must receive access equal to that of PRTC's off-island interexchange operations. We believe that the same conditions should be imposed here in light of the similarity between ATN's proposed provision of off-island service and the provision of off-island service in Puerto Rico. In both instances, the LEC is affiliated with a company that provides off-island message telephone service. ATN has failed to provide any persuasive evidence that these conditions should not apply. In fact, ATN agrees in principle with AT&T receiving the same premium access that it has always received as the traditional off-island carrier. With respect to AT&T's second proposed condition, the Commission's policy is clear; as long as equal access does not exist, AT&T, as the traditional off-island carrier, must receive the superior access.[7] In addition, Vitelco must provide to other authorized off-islands carriers access equal to that provided to ATN or any other affiliated company.[8] Therefore, ATN's attempt to justify Vitelco's offering premium access to more than one carrier in a non-equal access environment is inconsistent with the Commission's finding in the *Report and Order*.

9. *Other Safeguards*. We also find that the imposition of other safeguards on ATN and Vitelco are appropriate to prevent cross-subsidization by Vitelco of its off-island services. Specifically, ATN and Vitelco should comply with the cost allocation mechanisms set forth in paragraph 64 of the *Report and Order*. ATN notes that Vitelco already complies with those portions of the Commission's Rules governing cost allocation. We also find that the CPNI and network disclosure requirements set forth in the *Report and Order* are also applicable. Accordingly, we require that within 90 days from the release date of this order Vitelco file with the Commission its proposed plan for complying with these conditions.

10. In imposing these conditions, we reject ATN's argument that the factual predicate in the U.S. Virgin Islands, in contrast to Puerto Rico, renders such conditions unnecessary and inappropriate. In particular, ATN cites a Commission order which states that the decision to require PRTC to develop a CPNI plan was based, in part, on PRTC's proposed provision of both local and interexchange service without the creation of a separate subsidiary.[9] We note, however, that PRTC must still comply with the CPNI requirements set forth in the *Report and Order* although off-island services are provided by TLD, a separate subsidiary of PRTA. Similarly, while considerations of PRTC's size, its facilities ownership and the size of the off-island toll market may have influenced the Commission to impose information disclosure requirements in the *Report and Order*, those requirements remain in effect even though it was subsequently determined that TLD, and not PRTC, would provide off-island message telephone service. Finally, we note that in authorizing TLD to provide international resale services off the island of Puerto Rico, the same conditions were imposed on TLD's resale authorization as were imposed on PRTC and TLD by the *Report and Order* and the Commission's order granting non-dominant status to TLD in the provision of off-island services.[10]

11. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services on a resale basis to the general public by ATN.

12. Accordingly, IT IS ORDERED that application File No. I-T-C-89-130, IS GRANTED, and ATN is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, SBS's Tariff F.C.C. No. 4, Allnet's Tariff F.C.C. No. 5 and FTC's Tariff F.C.C. No. 23 between the United States and the points listed in those tariffs.

13. IT IS FURTHER ORDERED that this authorization is conditioned upon Vitelco complying with the conditions set forth in paragraphs 8 and 9 within 90 days from the release date of this order.

14. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

15. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

16. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

17. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

## FOOTNOTES

[1] Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, CC Docket No. 86-309, Report and Order, 2 FCC Rcd 6600 (1987) (hereinafter *Report and Order*).

[2] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[3] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

[4] Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket 79-252), Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rule Making, FCC No. 82-187 (released April 21, 1982); Third Further Notice of Proposed Rule Making, 48 Fed. Reg. 28,292 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rule Making, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984), *recon. denied*, FCC 85-572 (released November 20, 1985); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated and remanded sub nom.*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[5] Puerto Rico Telephone Authority, 3 FCC Rcd 5675 (1988).

[6] *Id.*

[7] *See* 2 FCC Rcd at 6608.

[8] *See* 2 FCC Rcd at 6606.

[9] We note that the Commission order cited by ATN was specifically limited to the narrow issue of whether TLD should be found non-dominant in the provision of domestic and international off-island services. The order was not intended to modify the conditions imposed in the *Report and Order*. *See* 3 FCC Rcd at 5677, para. 16.

[10] Telefonica Larga Distancia de Puerto Rico, 4 FCC Rcd 4496, 4497 (1989).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Whidbey Telephone Company request
for waiver of Section 80.453
of the Rules.

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 17, 1989; Released: November 27, 1989**

By Chief, Private Radio Bureau:

**I. Introduction**

1. Whidbey Telephone Company (Whidbey), licensee of very high frequency (VHF) public coast station WHU300, has requested a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to serve a limited number (not more than twenty-five) of vehicles on land on a secondary basis. This action grants the requested waiver.

**II. Background**

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. In deciding not to adopt such general rules, the Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. The Commission stated: "The comments point out that maritime frequencies in many areas of the country are already extremely congested. In other areas of the country, however, lakes and rivers freeze over and the seasonal factors greatly affect capacity." *Report and Order* at 1312. Having decided not to adopt general rules, the Commission nevertheless recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to or derogation of maritime communications." *Report and Order* at 1313. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis.

**III. Discussion**

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. In support of its request, Whidbey indicates that it will provide service only to a limited number of vehicles, a maximum of 25. It states that service will be provided on a basis strictly secondary to service to ships and then only during periods when there is limited or no maritime traffic. The station serves the central Puget Sound.

4. Under these highly restricted circumstances, we are waiving the rules to permit Whidbey to provide subsidiary service to the limited number of land vehicles requested. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by Whidbey must be type accepted for use in the Maritime Services (Part 80), the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22) and must be capable of operating only on the maritime public correspondence channels authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any channel other than those authorized for station WHU300. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely being tuned to such frequencies with external controls.

6. In PR Docket No. 86-2,[1] the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land vehicles that utilize a public coast station's excess capacity operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' communications since enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licensees for each vehicle. We shall, therefore, modify Whidbey's license to require permit subsidary communications on a secondary basis. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

**IV. Conclusion**

7. In view of the above, IT IS ORDERED that the requests for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license WHU300 submitted by Whidbey Telephone Company to serve vehicles, on a secondary basis, IS GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

**FOOTNOTE**

[1] *See Notice of Proposed Rule Making*, 51 Fed. Reg. 4554 (1986).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

UTICA-ROME CELLULAR PARTNERSHIP File No. 03227-CL-MP-89

For authorization to modify facilities, add additional facilities, and expand its Cellular Geographic Service Area for Station KNKA 438 in the Domestic Public Land Cellular Radio Telecommunications Service in the Utica-Rome, New York MSA, Market No. 115-B

## MEMORANDUM OPINION AND ORDER

**Adopted: November 15, 1989; Released: November 27, 1989**

By the Chief, Mobile Services Division:

1. Utica-Rome Cellular Partnership (Utica-Rome Cellular or "Applicant"), the Block B cellular licensee for Utica-Rome, New York, has filed the captioned application for a major modification of its Cellular Geographic Service Area (CGSA). Its competitor, Utica Telephone Company (Utica Telephone or "Petitioner"), the Block A cellular licensee for Utica-Rome, New York, has filed a Petition to Dismiss or Deny the application. Responsive pleadings have been filed.

### I. PARTIES' CONTENTIONS

2. Utica Telephone argues that Utica-Rome Cellular's application is defective for two reasons. First, Petitioner argues that applicant fails to meet the requirements of Section 22.917(a)(1)[1] of the Commission's rules because it has not filed a showing of its financial ability to meet the costs of construction and estimated operating expenses for one year. Petitioner points out that Utica-Rome Cellular proposes to add four cell sites and, based on an affidavit of Stuart Hosler, engineer for Utica Telephone, Petitioner argues that the addition of these sites will cost about $935,710 in construction costs and about $24,000 for first year operations.

3. Second, Petitioner argues that Utica-Rome Cellular has violated Section 22.13(a)[2] because it failed to disclose the partners of the general partnership which holds a 55% controlling interest in the licensee, and owners of the remaining 45% interest in the licensee.

4. In opposition to Petitioner's first argument, Utica-Rome Cellular argues that "it is [our] understanding, based upon observation of FCC processing of other CGSA enlargement applications that financial qualification showings are not required for proposed modification of cellular facilities." (Reply at 2) Utica-Rome Cellular also argues that Section 22.917(a)(1) is intended only for initial cellular grants and that since it has a proven track record and documented financial qualifications, dismissing its application based on Petitioner's argument would not be in the public interest. However, applicant has also filed an amendment to its application containing a financial showing pursuant to Section 22.917(a)(1).

5. In opposition to Petitioner's second argument, Utica-Rome Cellular argues that it responded fully to the questions on the Form 401, although it did not identify each of its minority partners because that information is contained in Commission station files for Station KNKA438. However, Utica-Rome Cellular submits an amendment to its application showing the names and percentages of ownership of its two partners with a five percent or greater interest, which it indicates conforms with the information already on file with the Commission.

### II. DISCUSSION

6. Section 22.917(a)(1) of the Rules states that in the top 120 markets, "[a]pplications for . . . modified facilities shall demonstrate the applicant's financial ability to meet the realistic and prudent . . . [e]stimated costs of proposed construction and other initial expenses. . . . [and] [e]stimated operating expenses for a period of one year, depending upon the nature of service proposed and the degree of business uncertainty or risk." Thus, Petitioner is correct that the rules require that an applicant provide a showing of ability to finance the new construction and first year operating expenses. Cellular permittees and licensees filing applications for expansion of their CGSAs have generally requested a waiver of Section 22.917(a)(1). In this case, Utica-Rome Cellular did not request a waiver, but it has amended its application with a financial showing consistent with Section 22.917(a)(1). Accordingly, we find that its application meets the Commission's financial showing requirements.

7. Likewise, applicant's application as originally filed failed to comply with Section 22.13(a)(1)(iii) of the Commission's rules because applicant did not provide a list of persons holding five per cent or more of its stock.[3] Moreover, applicant did not specify in its application that no ownership changes have occurred, and it did not incorporate the ownership information from its original application by reference in its instant application. However, applicant has corrected this deficiency with an amendment. We find no intent to withhold information from the Commission in this case. Nevertheless, we remind all applicants to comply with Section 22.13 even if there has been no change in ownership.

### III. ORDERING PARAGRAPHS

8. Accordingly, IT IS HEREBY ORDERED that the Petition to Dismiss or Deny filed by Utica Telephone Company IS DENIED;

9. IT IS FURTHER ORDERED that the application of Utica-Rome Cellular Partnership, File No. 03227-CL-MP-89, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

## FOOTNOTES

[1] Section 22.917 states in pertinent part:

(a) *Top - 120 markets.* (1) Applications for new stations or modified facilities shall demonstrate the applicant's financial ability to meet the realistic and prudent:

(i) Estimated costs of proposed construction and other initial expenses; and

(ii) Estimated operating expenses for a period of one year, depending upon the nature of service proposed and the degree of business uncertainty or risk.

[2] Section 22.13(a) states in pertinent part:

(a) Each application for a radio station authorization . . . shall:

(1) Disclose fully the real party or parties in interest, that are engaged in the Public Mobile Services, including the following information:

(i) A list of its subsidiaries, if any. . . .

(ii) A list of its affiliates, if any. Affiliates means any business which holds a five per cent or more interest in the applicant, or any business in which a five per cent or more interest is held by another company which holds a five per cent interest in the applicant. . . .

(iii) A list of the names, addresses, citizenship and principal business of any person holding five per cent or more of each class of stock . . . together with the amount and percentage held. . .

[3] It is particularly important that cellular permittees and licensees file complete ownership information with new applications because the Commission recently eliminated the rule requiring periodic ownership reporting (Form 430). Thus, modification applications are our primary method of recording minor ownership changes.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-527**

In the Matter of

Amendment of Section 73.202(b), RM-7044
Table of Allotments,
FM Broadcast Stations.
(Valley City, North Dakota)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 8, 1989; Released: November 28, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ingstad Broadcasting, Inc. (petitioner), requesting the substitution of Channel 266C1 for Channel 265A at Valley City, North Dakota, and the modification of its license for Station KLPR accordingly. Petitioner states that it will apply for the channel, if allotted.

2. Channel 266C1 can be allotted to Valley City in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.2 kilometers (5.1 miles) southwest to avoid a short-spacing to Station KBHP, Channel 266C1, Bemidji, Minnesota.[1] Canadian concurrence is required since Valley City is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. As requested, we also propose to modify petitioner's license for Station KLPR to specify operation on Channel 266C1. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 266C1 at Valley City or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. We believe the public interest would be served by proposing the substitution of Channel 266C1 for Channel 265A at Valley City, North Dakota, since it could enable Station KLPR to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Valley City, North Dakota | 265A | 266C1 |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 19, 1990,** and reply comments on or before **February 5, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clifford M. Harrington, Esq.
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTE

[1] The coordinates for this allotment are North Latitude 46-50-52 and West Longitude 98-03-02.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-534**

In the Matter of

Amendment of Section 73.202(b), RM-7037
Table of Allotments,
FM Broadcast Stations.
(Buffalo and Vine Grove,
Kentucky)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 13, 1989; Released: November 28, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Larue County Broadcasting (petitioner), permittee of Station WRZI(FM), Channel 268A, Buffalo, Kentucky, seeking to change the community of license of Channel 268A from Buffalo to Vine Grove, Kentucky, and modify its construction permit (BMPH-881227IA) accordingly.

2. Petitioner states that Vine Grove (population 4,039) presently has no local service, whereas Buffalo (population 300)[1] is presently served by petitioner's station and Station WXAM(AM). In addition, petitioner notes that Buffalo receives service from nearby Station WKMO(FM) in the adjacent county seat of Hodgenville, Kentucky. Petitioner also states that the new community would serve the Commission's allotment priorities better than maintaining the allotment to the old community because it would bring a first local service to Vine Grove, which has a population of 4,309, whereas Buffalo has a population of 300.[2]

3. An engineering analysis reveals that Channel 268A can be allotted to Vine Grove in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction of 10.6 kilometers (6.6 miles) [3] south of the community. We believe the public interest would be served by proposing to change the community of license for Channel 268A from Buffalo to Vine Grove, Kentucky, as the change could provide Vine Grove with a first local service.

4. In view of the fact that Vine Grove, Kentucky, could receive its first local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| City | Channel No. Present | Proposed |
|---|---|---|
| Buffalo, Kentucky | 268A | – |
| Vine Grove, Kentucky | – | 268A |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 19, 1990,** and reply comments on or before **February 5, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Keith Reising, Owner
Larue County Broadcasting
1680 Hwy 62E
Corydon, IN 47112

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding, unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] *See Report and Order*, MM Docket No. 88-526, 54 FR 26199, June 22, 1989.

[3] Coordinates for Channel 268A at Vine Grove, Kentucky, are 37-43-09 and 86-01-13.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-535**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-6980 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Elizabeth City, North Carolina, | |
| and Chesapeake, Virginia) | |

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 13, 1989; Released: November 28, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Edge Broadcasting Company (petitioner), licensee of Station WMYK(FM), Channel 229C, Elizabeth City, North Carolina, proposing the change of community of license for Channel 229C at Elizabeth City to Chesapeake, Virginia. Petitioner also requests the modification of its license for Station WMYK(FM) to specify operation on Channel 229C at Chesapeake.

2. Petitioner submits information in support of its proposal. Petitioner states that it intends to continue to operate Channel 229C at its current transmitter site. Further petitioner states that the location of Station WMYK(FM)'s transmitter site is in Moyock, North Carolina, in close proximity to the Virginia border. Petitioner asserts that Chesapeake is located approximately 40 kilometers from Elizabeth City, thus the proposal would be mutually exclusive with its present allotment. In addition, the petitioner asserts that the reallotment of Channel 229 from Elizabeth City to Chesapeake will not result in the removal of that community's only local transmission service. Petitioner goes on to state that currently there are four broadcast services at Elizabeth City whereas there is only one such service at Chesapeake. Petitioner contends that the public interest would be served by the proposal based on the population of 134,400 for Chesapeake as opposed to 14,890 at Elizabeth City.

3. The communities of Chesapeake and Elizabeth City are separated by 58 kilometers (36 miles), whereas the required separation between Class C co-channel allotments is 290 kilometers (180 miles). Therefore, the proposal is mutually exclusive with the present allotment. The removal of Channel 229C from Elizabeth City will not deprive that community of its first or second local service, since Elizabeth City also currently receives local broadcast service from Stations WGAI(AM), WCNC(AM) and WKJX-FM. On the other hand, Chesapeake currently receives local broadcast service from Channel WJQI(AM). The population for Elizabeth City is 14,004, and for Chesapeake, 114,486.[1]

4. After a careful examination we tentatively conclude that the proposal, if granted, would result in a preferential arrangement of allotments. Therefore, in accordance with Section 1.420(i) of the Commission's Rules, we shall propose the reallotment of Channel 229C from Elizabeth City, North Carolina, to Chesapeake, Virginia. The allotment of Channel 229C to Chesapeake can be made in compliance with the Commission's minimum distance separation requirements at the present transmitter site of Station WMYK(FM), which is located 31.7 kilometers (19.7 miles) south of Chesapeake.[2] As requested, we shall propose to modify the license of Station WMYK(FM) to specify operation on Channel 229C at Chesapeake in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest in the use of Channel 229C at Chesapeake nor require the petitioner to demonstrate the availability of an additional equivalent class channel at Chesapeake.

5. In view of the fact that Chesapeake, Virginia, could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Elizabeth City, North Carolina | 229C, 244A | 244A |
| Chesapeake, Virginia | --- | 229C |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 19, 1990,** and reply comments on or before **February 5, 1990** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

William M. Barnard, Esquire
Pamela C. Cooper, Esquire
McFadden, Evans & Sill
1220 19th Street, N.W.
Suite 501
Washington, D.C. 20036
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] The coordinates are 36-32-57 and 76-11-21.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-491**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | *RM-6371* |
| Table of Allotments, | RM-6650 |
| FM Broadcast Stations. | |
| (*Vacaville* and Middletown,[1] | |
| California) | |

**FIRST REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 13, 1989; Released: November 28, 1989**

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 6128 (1988), issued at the request of Quick Broadcasting, Inc. (petitioner), licensee of Station KUIC(FM), Channel 237A, Vacaville, California, proposing the substitution of Channel 237B1 for Channel 237A and modification of its license accordingly. Petitioner filed supporting comments reaffirming its intention to effectuate the upgrade of its facilities. Joe L. and L. Ann Gross ("the Grosses")[2] filed comments and a counterproposal, [3] to which petitioner responded. Petitioner and the Grosses each filed additional comments.[4]

2. In response to the *Notice*, the Grosses requested the allotment of Channel 238A to Middletown, California,[5] as a first local service. The distance between Middletown and Vacaville is 64 kilometers whereas 88 kilometers is required in this instance.[6] Thus, the proposals are mutually exclusive. In support of their proposal, the Grosses claim that due to the mountainous terrain between Vacaville and the petitioner's proposed site north of the community,[7] severe shadowing would occur. Moreover, according to the Grosses, area terrain factors appear to preclude the availability of any alternate site from which a 70 dBu signal could be provided over the entirety of Vacaville. Additionally, the Grosses state that because of co-channel and adjacent channel constraints, a restricted area to accommodate petitioner's proposal has little latitude for any movement in any useable direction, especially to the south and east. Thus, the Grosses assert that petitioner's proposal is technically deficient in that it would be unable to comply with Section 73.315(b) of the Commission's Rules. In any event, the Grosses urge that under the Commission's allotment priorities in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 99 (1982), the proposal to provide Middletown with a first local service should prevail over the need for the Vacaville modification proposal.

3. In response, petitioner claims that the map accompanying the Grosses' engineering study indicating that Vacaville would be shadowed is misleading since the scale shows that the height is in exaggerated relationship to the distance.

4. Petitioner argues that, even assuming that Middletown is a community for allotment purposes,[8] Channel 254A can be allotted at the reference coordinates suggested by the Grosses for Channel 238A,[9] consistent with the Commission's rules.[10] Thus, petitioner asserts there is no need to make a choice between the two proposals since each may be accommodated.

5. In response, the Grosses reiterate their earlier belief that due to the mountainous terrain in the Vacaville area, petitioner would be unable to select a site from which line-of-sight could be obtained as required by Section 73.315(b) of the Commission's Rules. In this vein, the Grosses cite numerous cases which they claim support the Commission's refusal to allot FM channels where 70 dBu coverage could not be provided over the proposed city of license. Thus, the Grosses state that since petitioner has not demonstrated that its proposal is technically feasible, it should be rejected. Additionally, the Grosses claim that since petitioner's proposal is technically unsuitable, it is unnecessary to evaluate its merits vis-a-vis its conflicting proposal, citing *Jefferson City, TN*, 48 FCC 2d 108, 110 (1974).

6. The Grosses also reject the petitioner's assertion that Channel 254A could be allotted to Middletown to satisfy its interest. The Grosses insist that Channel 238A could be used at an antenna farm located approximately five miles south of Middletown, whereas alternate Channel 254A could not be used from that location. Further, the Grosses state that favorable terrain factors at the antenna farm location would allow optimum service to Middletown.

7. In response, petitioner continues to refute the Grosses' claim that the Vacaville proposal is technically deficient. In an extensive engineering study, petitioner provides information regarding the Allendale site from which petitioner wishes to broadcast[11] and seeks to demonstrate that, based on a supporting structure of 600 feet, shadowing would occur only on the 189 degree radial. Petitioner advises that the signal strength on the 189 degree radial would not be reduced below 70 dBu, and no shadowing would occur on two other radials, 168 and 198 degrees. Moreover, contrary to the Grosses' claim, petitioner indicates that many other sites are available near an area referred to as "Pleasants Ridge."[12] Proposing the use of a structure of 30 meters (98 feet) from this site, petitioner claims that terrain plots on the radials at 141, 143 and 150 degrees reveals that a 70 dBu contour would encompass all of Vacaville.

8. Petitioner also disputes the Grosses' claim that Channel 238A is superior to its suggested use of Channel 254A at Middletown. Although the Grosses maintain that use of Channel 238A at an existing antenna farm (referred to as the "Radio Relay site"),[13] could provide better service to Middletown than could Channel 254A located elsewhere, petitioner claims it is unreasonable to site an allotment a greater distance from the center of population than is necessary. Petitioner's consulting engineer states that the Grosses' specified site for Channel 238A at the Radio Relay site is 6.6 miles south, at the limit required to provide a 70 dBu signal over Middletown, whereas, according to his engineering studies, Channel 254A could

exceed 70 dBu service to Middletown from other closer areas. Petitioner concludes that the Grosses have failed to demonstrate any advantage from the requested use of Channel 238A at the antenna farm site.

9. In supplemental comments, the Grosses continue to support the alleged superiority of Channel 238A at the Radio Relay site at Middletown, and to dispute petitioner's ability to provide line-of-sight coverage to Vacaville. Further, the Grosses allege that petitioner's engineering studies do not authenticate the availability of any of the properties at the theoretical sites presented by petitioner for installation of a broadcast transmitting facility.[14]

10. Petitioner concludes that since Channel 254A is available at Middletown, the Grosses' unsupported preference for a specific site from which a station's signal could barely cover Middletown[15] should not be allowed to preclude its request to improve the facilities of Station KUIC(FM). Petitioner acknowledges that although its showing of 70 dBu coverage over Vacaville from several other sites was less rigorous than the site originally selected for demonstration of coverage, it believes it has provided a sufficient showing that compliance with Section 73.315(b) of the Commission's Rules can also be met from other sites. Thus, petitioner urges adoption of its proposal.

## DISCUSSION

11. The Vacaville and Middletown proposals are mutually exclusive since they are separated by less than the 88 kilometers required between first adjacent Class A and B1 allotments. Since the Vacaville proponent seeks to modify its facilities in accordance with the provisions of Section 1.420(g) of the Commission's Rules, it was determined that Channel 254A is available as an alternative channel to Middletown, and can be allotted without the imposition of a site restriction.[16] Although the Grosses have opposed consideration of Channel 254A in lieu of Channel 238A at their specified site, Paragraph 3(c) of the Appendix to the *Notice* in this proceeding advised that filing of a counterproposal may result in the allotment of channels of a class equivalent to those requested. Moreover, the Commission may allot a different channel of the same class on its own motion in the course of a rule making proceeding, thereby ensuring the most efficient use of the spectrum. *See Selma and Georgianna, AL*, (MM Docket 88-367), 4 FCC Rcd , DA 89-1269 (released October 17, 1989); *Williston and Micanopy, FL*, 50 RR 2d 1425 (1982). Furthermore, in determining compliance with Section 73.207(b) of the Commission's Rules, if a new proposed allotment requires a site restriction, the Commission will endeavor to impose that which is the least restrictive theoretical site from the intended city of license. *See Fort Myers, FL*, 3 FCC Rcd 2671 (1988). It is not until the application stage that the actual availability of a particular site is demonstrated. *See West Palm Beach, FL*, 3 FCC Rcd 5810 (1988). Given this governing policy and precedent, and our general reluctance to deny an allotment solely because of a party's mere site preference, we decline to deny the Vacaville upgrade.

12. In light of the fact that there is some question as to whether Middletown is even a community for allotment purposes, we will request the filing of additional information from the Grosses. Although the Grosses have supplied extensive engineering data in this proceeeding, there is virtually nothing in their comments addressing petitioner's doubt regarding Middletown's status. Rather, the Grosses indicate that Middletown is located at the junction of two state highways, and according to the California Census (Publication OC 80-1-A6), is a part of the Lower Lake-Middletown Division of Lake County. However, no separate population figure is provided for Middletown. We note that Middletown is neither listed in the 1980 U.S. Census nor incorporated, but is shown in the 1988 Rand McNally *Commercial Atlas and Marketing Guide*, which attributes it with a population of 2000, and indicates that it has a post office and banking facilities. Under the circumstances, those factors are not sufficient to warrant a determination that Middletown is a community for allotment purposes. *See Oak Beach and Bay Shore, NY*, 57 RR 2d 1275 (1985). Therefore, since Middletown is neither listed in the U.S. Census nor incorporated, we believe that additional demographic data is required to assist us in determining whether it is a community for allotment purposes. Consequently, we will not allot a channel to Middletown at this time, but rather will issue a separate *Further Notice* in this proceeding requesting additional information in order to establish Middletown's status. *See Canton, Tioga and Ulysses, PA*, 2 FCC Rcd 2055 (1987).

13. With respect to the feasibility of petitioner's proposal, one of the crucial factors in determining if an allotment is technically acceptable is whether a suitable site area exists in which to locate a transmitter complying with all of the Commission's engineering requirements and providing adequate service to the community. Where it is alleged that a site cannot be found that allows line-of-sight coverage over the community or a transmission path free of major obstructions, as required by Section 73.315 of the Commission's Rules, the proponent must demonstrate by an engineering showing that the received signal strength as transmitted from the site will exceed 70 dBu and will encompass the entire principal community. Here, the suitability issue rests on whether a 70 dBu signal can be provided over Vacaville from the petitioner's suggested site specified in the *Notice*, or from one of the alternate sites suggested in petitioner's comments. A staff engineering analysis has determined that, based on our own examination of the pertinent terrain, it appears that a 70 dBu signal could be provided over Vacaville from the petitioner's preferred site 11.3 kilometers (7.0 miles) north of Vacaville[17] if petitioner utilizes a transmitter height of 230 meters (750 feet). Alternatively, it appears that a 70 dBu signal could be provided over Vacaville from petitioner's alternate site on Pleasants Ridge,[18] located 14.5 kilometers (9 miles) northwest of the community, based on the use of a transmitter height of 30 meters (98 feet).

14. We believe the public interest would be served by substituting Channel 237B1 for Channel 237A at Vacaville, California, since it could enable Station KUIC(FM) to expand its coverage area. Based on the above determinations, we will substitute Channel 237B1 for Channel 237A at Vacaville, California, and modify petitioner's license for Station KUIC(FM), as requested. As indicated in the *Notice*, Channel 237B1 can be allotted to Vacaville in conformity with the Commission's Rules at the petitioner's suggested site 11.3 kilometers North of Vacaville, based on an antenna height of 230 meters (750 feet), or at its alternate site 14.5 kilometers northwest of the community, based on an antenna height of 30 meters (98 feet).

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 12, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

| City | Channel No. |
|---|---|
| Vacaville, California | 237B1 |

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Quick Broadcasting, Inc. for Station KUIC(FM), IS MODIFIED effective **January 12, 1990,** to specify operation on Channel 237B1 in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**FOOTNOTES**

[1] Middletown has been added to the caption.

[2] The Grosses are identified as shareholders in the license of Station KDJK(FM), Channel 236B, Oakdale, California. Although the petitioner questioned the Grosses motives in submitting their counterproposal, and suggested that the counterproposal may have been filed purely to block KUIC's upgrade, we need not address these questions in view of our determination herein.

[3] Public Notice of the counterproposal was given January 23, 1989, Report No. 1766.

[4] The following pleadings were filed after the reply comment period closed: Petition for Leave to File Response and Response to Reply Comments by the Grosses; Reply to Petition for Leave to File Response and Reply to Response, by petitioner; Request for Leave to File Supplemental Comments and Supplemental Comments by the Grosses; Request for Leave to File Reply and Reply to Untimely Filed Comments, by petitioner. The Commission's Rules do not contemplate the filing of pleadings beyond the comment period unless specifically requested. However, in this instance, the Grosses claim that site problems would make utilization of Channel 237B1 at Vacaville highly unlikely. Petitioner's response to these reply comments provide further engineering information in an effort to demonstrate site availability and the provision of service to Vacaville. In view of the fact that we would have compiled and considered the relevant information submitted on our own motion, we will accept the late-filed pleadings.

[5] Coordinates specified by the Grosses for Channel 238A are 38-45-08 and 122-36-50, which they assume are near the center of Middletown.

[6] The spacing requirements are based on the separation requirements prior to the revision of the Commission's Rules in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), which, *inter alia*, increased the maximum power for Class A facilities to 6 kW and adjusted the minimum distance spacing requirements accordingly.

[7] As indicated in the *Notice*, reference coordinates specified by the petitioner are 38-27-30 and 121-58-22, which would site the transmitter for Channel 237B1 a distance of 11.3 kilometers (7.0 miles) north of Vacaville. This site is referred to as the "Allendale site".

[8] Petitioner states that the Grosses have provided no population figure for Middletown, but rather notes that it is only part of a census designated place, and has no separately identifiable population.

[9] *See* footnote 5, *supra*.

[10] Petitioner adds that in addition to Channel 254A, there are several other channels that could be allotted to Middletown with a slight site restriction (*i.e.*, less than 2-3 kilometers).

[11] *See* footnote 7, *supra*.

[12] Coordinates at the "Pleasants Ridge" site are 38-27-44 and 122-04-56.

[13] Although a map depicting the antenna farm was provided by the Grosses' consulting engineer, no coordinates were given, nor was a frequency separation study provided to indicate that from that site, Channel 238A could comply with Section 73.207(b) of the Commission's Rules.

[14] The Grosses also attempt at this juncture to introduce new arguments concerning the possibility of FAA constraints at Vacaville. However, we will not allow the flow of allegations in this proceeding *ad infinitum*. Rather, such allegation may be raised at the application level where the technical acceptability of a specific site may be fully explored.

[15] Petitioner adds that the Grosses did not mention that their preferred site for Channel 238A is used by several existing facilities serving Santa Rosa, California, and its surrounding areas, which has a population in excess of 100,000 persons.

[16] Coordinates used in this determination are the Middletown reference point at 38-45-12 and 122-36-54.

[17] *See* footnote 7, *supra*.

[18] *See* footnote 12, *supra*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-536**

In the Matter of

Amendment of Section 73.202(b), RM-7064
Table of Allotments,
FM Broadcast Stations.
(Ashley, Michigan)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 13, 1989; Released: November 28, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for rule making is a petition filed by William V. Constine (petitioner), requesting the allotment of FM Channel 223A to Ashley, Michigan, as that community's first FM broadcast service. Petitioner filed information in support of the proposed allotment and indicated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 223A can be allotted to Ashley, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Ashley is located within 320 kilometers of the U.S.- Canadian border, concurrence of the Canadian government will be requested.

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Ashley, Michigan, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Ashley, Michigan | ----- | 223A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 19, 1990,** and reply comments on or before **February 5, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby
10 East Fourth Street
P.O. Box 113
Frederick, Maryland 21701
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**FOOTNOTE**

[1] The coordinates for Channel 223A are 43-11-12 and 84-28-30.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-68**

In the Matter of

Amendment of Section 73.606(b), RM-6382
Table of Allotments,
Television Broadcast Stations.
(Clermont and Cocoa, Florida)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: November 20, 1989; Released: November 28, 1989**

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 2515 (1989) (" *Notice* "), issued in response to a petition for rule making filed jointly by Brevard Community College ("BCC"), licensee of noncommercial educational TV Station WRES, Channel *18, Cocoa, Florida, and Press Television Corporation ("Press"), permittee of commercial TV Station WKCF (formerly WCLU), Channel 68, Clermont, Florida (jointly referred to as "petitioners"). The *Notice* proposed an exchange of the Clermont and Cocoa channels pursuant to Section 1.420(h) of the Commission's rules. Petitioners filed comments in response to the *Notice*. Meredith Corporation ("Meredith"), licensee of Station WOFL(TV), Channel 35, Orlando, Specialty Broadcasting Corporation ("SBC"), licensee of low power television station Channel 19, Kissimmee, Florida, Community Communications, Inc. ("CCI"), licensee of public television station WMFE-TV, Orlando, Rainbow Broadcasting Company ("Rainbow"), permittee of Channel 65, Orlando, and the National Association of Public Television Stations ("NAPTS") filed opposing comments. Press, BCC, Meredith, and Rainbow filed reply comments.

2. We requested in the *Notice* that petitioners specifically address four issues regarding their proposal. First, we requested that petitioners discuss any additional public interest benefits of their proposal, such as areas and populations that would receive first noncommercial educational television service. Second, we requested BCC's assurance that any proceeds of the exchange would be devoted exclusively to activities related to the operation of the noncommercial educational television station. Third, we proposed that we would consider Press' request for a specific transmitter site at the " *de facto* " Orlando "antenna farm" near Bithlo, Florida. We requested that petitioners address Press' commitment to use the designated site, whether the site will remain available, and whether other sites in the antenna farm may be available which could provide better service to Clermont. We also asked petitioners to address the possibility that we might defer approval of a particular site to the application stage and, were we to do so, whether the exchange would proceed. Finally, relying upon petitioners' use of the terrain roughness correction factor as supported by field strength measurements, we proposed to accept petitioners' claim that city grade service would be provided to Clermont from the proposed transmitter site at the Bithlo antenna farm. We asked petitioners to provide additional details regarding their engineering statement, particularly regarding terrain roughness calculations. The comments are summarized below.

3. *Public Interest Benefits*. Petitioners claimed that the operation of WRES on Channel 68 would provide first noncommercial educational television service to 18,341 people, first or second such service to 99,441 people, and an increase in the population within WRES' Grade B contour from 165,181 people to 1,014,972 people. Petitioners also submitted approximately 300 letters from elected officials, business representatives, and area residents supporting their proposal.

4. Meredith, Rainbow, NAPTS and CCI claim that BCC can expand WRES' service on Channel 18. Meredith and Rainbow argue that the Glorious Church of God in Christ, Inc. ("Glorious Church"), the previous owner of WRES, filed a modification application that would have increased the population served by WRES to 1,060,264 people. NAPTS argues that the only benefit of the exchange is that BCC will be financially able to construct larger facilities. With respect to WKCF, Rainbow claims that Press could remain on its existing channel, move its transmitter to a site 7 kilometers (4.4 miles) from Clermont, and provide a better signal to Clermont and a Grade A signal to Orlando. In reply, Press argues that the supposed public interest benefits of alternative proposals advanced by third parties should not be considered in television channel exchange proceedings.[1] Press also claims that Glorious Church's previous modification proposals do not bind BCC. BCC argues that it is irrelevant if some or all of the public interest benefits could be achieved on its existing channel because, without Press' financial assistance, BCC would not be in a position to improve its facilities. In its reply, Meredith claims that Press and BCC are not qualified to judge the public interest benefits of the exchange because BCC was not the applicant for WRES, nor has it attempted to raise funds to keep the station operating and to improve facilities. Therefore, Meredith claims, the Commission should not defer to petitioners' determinations of the public interest.

5. NAPTS and CCI claim that Channel 18 is superior to Channel 68 because Channel 18 is much lower in the spectrum. NAPTS argues that Channel 18 is also superior because its transmitter can be located at the Bithlo antenna farm whereas there is less flexibility in locating a site for a Channel 68 transmitter in the Cocoa area. Furthermore, NAPTS claims that Channel 18 may have a superior channel position on cable television systems that carry broadcast stations on their over-the-air channel numbers. NAPTS also claims that the fact that Press is willing to pay more than one million dollars to obtain Channel 18 is evidence that it is a superior channel. CCI claims that viewers of WRES would be disadvantaged by tuner selection difficulties resulting from the wide separation of Channel 68 from other area UHF channels. NAPTS claims that this exchange would circumvent our policy of prohibiting commercial broadcasters from using noncommercial allotments to obtain a lower channel.[2] In reply, Press and BCC characterize NAPTS' comments as an untimely attack against the channel exchange proce-

dure. Press argues that even if one UHF channel is considered to be "inferior" to another, channel inferiority is not a sufficient grounds for rejection of an exchange proposal because almost any exchange would be subject to such a challenge.

6. CCI argues that approval of the exchange and implementation of the service proposed by petitioners would result in a substantial overlap of the signal contours of noncommercial educational TV Stations WMFE-TV and WRES. CCI claims that many of the new viewers of WRES would be former viewers of WMFE-TV. CCI estimates that if the exchange is approved WMFE-TV is likely to lose approximately 20,000 or more viewers per year, or 34% of its existing viewing audience by 1993, and experience a corresponding decrease in membership growth, which would result in an erosion of the quality and variety of programming. Furthermore, argues CCI, the stations would be forced to compete for funding from the same sources, and regional competition between the stations could cause a "bidding auction" for certain programming. In reply, Press argues that CCI's opposition is based on the fact that approval of the plan would result in competition between WMFE-TV and WRES. Press argues that CCI's claims of injury to its station arising from competition are speculative. Press and BCC claim that CCI is an affiliate of PBS, whereas BCC is not, and that BCC does not substantially duplicate CCI's programming and does not plan to do so. BCC submits television listings for each station to show the differences in programming. BCC also claims that it broadcasts a significant amount of instructional and community related programming.

7. Rainbow submits an engineering statement claiming that the presence of the proposed Channel 18 antenna on the same tower it is authorized to use at a height that is in the aperture of its proposed Channel 65 directional antenna is expected to cause distortion in the horizontal plane radiation pattern of the Channel 65 antenna. In reply, Press claims that Rainbow's engineering statement offers no technical basis for this conclusion, nor does Rainbow explain the type of distortion that could occur.

8. *Use of Proceeds*. BCC provides an assurance that it would devote the proceeds from the proposed exchange to insure the implementation of the proposals described in petitioners' petition for rule making, including the development of technical facilities. No commenter challenges BCC's assurance.

9. *Consideration of Specific Transmitter Site*. Petitioners argue that Press' proposed site should be expressly considered and approved in this proceeding because no other party can apply for the channel and therefore consideration of any other sites would be an unnecessary waste of Commission resources. Press states that it will not effectuate the channel exchange unless its site is approved in this proceeding. Press submits a copy of a letter offering assurance that space remains for its antenna on the proposed tower. Press also states that it is unaware of any equivalent sites in the area of the antenna farm which could provide significantly better service to Clermont. In reply comments, Meredith argues that even a tentative grant of authority to Press to operate from Bithlo is beyond the bounds of this proceeding, and that, if the Commission is inclined to approve the proposal, it should defer a final decision until Press submits all necessary information to ensure that approval of the site is technically possible.

10. *City Grade Service to Clermont from the Proposed Bithlo Transmitter Site*. Petitioners submit a terrain profile of a radial between the Bithlo site and Clermont and describe the methodology used to derive that profile. In opposition, Meredith, Rainbow, SBC and CCI claim that the Commission must waive its city grade contour requirement to permit the exchange. SBC submits an affidavit from an individual identified as a former engineer for Press who claims that an initial engineering study conducted by Press indicated that a city grade signal could not be provided to Clermont from the Bithlo site. In reply comments, Meredith references SBC's comments and argues that Press' failure to mention this preliminary study in its comments indicates that Press' engineering studies may have been outcome-driven and are therefore unreliable. Meredith also argues that Press' claim of city grade service may constitute a knowing misrepresentation or, at the very least, an extreme lack of candor. In reply, Press argues that Meredith offers no support for its claim that Press would be unable to provide a city grade signal to Clermont. Press argues that the allegations in the affidavit are immaterial, and questions the former employee's qualifications to render an engineering opinion. Press notes that although the affidavit refers to an engineering study, SBC offers neither the result of the study nor evidence that the study was conducted pursuant to the Commission's standards for field strength measurement studies. Press argues that the measurements submitted in petitioners' rule making petition are fully documented and reliable, and attributes any differences between the studies to the fact that field strength measurements are subject to variations attributable to various factors. Furthermore, Press notes that the Commission did not rely primarily on the field strength measurements in determining city grade coverage, instead relying upon the use of the terrain roughness correction factor.

11. *Other Matters*. Meredith and Rainbow argue that Clermont and Cocoa, which are approximately 100 kilometers (64 miles) apart, are not in "substantially the same market" as required for a channel exchange pursuant to Commission rule 1.420(h). Meredith claims that WKCF's current coverage barely extends to Cocoa, and WRES's Grade B contour is approximately 60 kilometers from Clermont. Meredith argues that the only commonality between the stations is the fact that they are both in the Orlando-Daytona Beach-Melbourne-Cocoa Area of Dominant Influence (ADI). Meredith argues that approval of this exchange will render meaningless the definition of "substantially the same market". In reply, Press claims that Meredith's assertion is inconsistent with petitioners' showing in its petition for rule making that the channels, when occupied by stations using more than minimal facilities, will substantially overlap. Press notes that the Commission has designated Orlando-Daytona Beach-Melbourne-Cocoa as a single television market in Section 76.51 of its rules.

12. Meredith questions whether Press intends to effectively change WKCF-TV's community of license after the exchange. SBC argues that Orlando is a well served market, and that the needs of Clermont would not be served by an additional Orlando station that delivers a signal of marginal quality to Clermont. CCI argues that the exchange proposal could constitute a possible *de facto* reallotment of the Clermont channel to Orlando. [3] In

reply, Press states that it has no intention of abandoning service to Clermont and plans to continue to fully satisfy its obligations to its community of license.

13. Meredith suggests that Press may have acquired WRES from Glorious Church and assigned it to BCC without the Commission's knowledge. Meredith submits a copy of a newspaper article reporting that Press "recently bought Cocoa station WRES-TV Channel 18 from a Tampa church." Meredith claims that Press, a for-profit entity, would have been ineligible to hold a noncommercial license, and that no assignment application was filed to reflect an assignment from Press to BCC. Meredith argues that the newspaper article raises a material question as to whether Press actually acquired WRES, and suggests that Press' role in the transfer from Glorious Church to BCC should be fully examined in a hearing. Rainbow argues that the negotiation by Press of an exclusive right to propose a channel exchange with Glorious Church, and the transfer of that right to BCC, constitutes an improper grant of a property right in a license. Approval of the exchange, claims Rainbow, would constitute ratification of an improper contractual provision in violation of the holding of *FCC v. Sanders Brothers*, 309 U.S. 470 (1940). In reply, Press argues that it disclosed its involvement with WRES to the Commission and that its involvement was a matter of record prior to BCC's acquisition of WRES. Press argues that Rainbow mistakenly claims that Press improperly acquired a "property right" in WRES.

14. Meredith alleges that Press' funding of WRES raises questions as to whether Press has exercised *de facto* control of the station. Meredith states that Section 310(d) of the Communications Act prohibits the assignment or transfer of any station license, either directly or indirectly, without prior Commission consent, or the transfer of control of an entity holding a permit or license without Commission authority. Meredith argues that Press advanced funds to BCC, that BCC will use a transmitter site licensed to Press, that Press is responsible for preparing, filing and prosecuting the petition for the channel exchange, and that Press may have influenced Glorious Church to abandon its modification application to enlarge its coverage area. Meredith claims that these activities show that Press exercises a sufficient degree of control over WRES to warrant a hearing. In reply comments, Rainbow alleges that Press' control over the disposition of WRES raises serious questions of licensee propriety. In reply, Press argues that Meredith should have expressed its concerns when Press assigned WRES to BCC. Press notes that it made all of the assignment agreements available to the public and the Commission prior to the transfer. Furthermore, Press states that at no time did it exercise control over WRES' construction permit.

15. SBC claims that the exchange would result in the displacement of its LPTV channel because that facility would be within the Grade A contour of the proposed Channel 18 station. SBC claims that this would result in substantial economic harm to its station, and would disrupt or terminate its service. SBC claims that the availability of additional LPTV construction permits in the area is extremely limited or nonexistent and that it has been unable to purchase a construction permit on reasonable terms. While SBC states that it does not believe that the presence of LPTV stations should preclude the initiation of full power television service, it argues that we should consider the harm to its station when analyzing the benefits of this proposal. In reply, Press claims that SBC should have been aware of the possibility that it could be forced to move its LPTV channel due to a conflict with a full-service station.

## DISCUSSION

16. After careful consideration of the comments received in response to the *Notice*, we conclude that approval of the proposed channel exchange is in the public interest. As a result of this exchange, BCC will receive financial assistance from Press that will enable BCC to improve its facilities, thereby increasing the population within the WRES Grade B service area from 165,118 people to 1,014,972 people, and providing first noncommercial educational television service to 18,341 people. Furthermore, Press will be able to change the technical facilities for its station, thereby providing a WKCF Grade B service to 1,396,543 people.

17. Claims that BCC could expand its service on its existing channel are irrelevant to our analysis of the public interest benefits of the exchange in this proceeding. The *Channel Exchange Procedure Report and Order* does not limit approval of channel exchanges to instances in which technical constraints preclude noncommercial service improvements on an existing channel. Regardless of the extent of technical improvements that BCC could initiate on its existing channel, BCC has stated that it is unable to improve its facilities without Press' assistance, and Press will not provide that assistance unless the channel exchange is approved.[4] Therefore, this exchange will permit a vast expansion of BCC's noncommercial educational television service that might not otherwise be implemented.

18. Commission policy is to presume that UHF channels are equivalent for allotment purposes. We will not deny an exchange on the grounds that one UHF channel is "superior" to another. The *Channel Exchange Procedure Report and Order* contained no such prohibitions on exchanges. We note that, as a general policy, the Commission is reluctant to alter noncommercial educational channel allotments by dereserving lower UHF channels and substituting higher UHF channels if the allotment is presently unused and unapplied for. *See Report and Order (Houston, Texas)*, 50 RR 2d 1420 (1982). However, this policy is inapplicable in the context of a channel exchange procedure pursuant to Section 1.420(h) of the Commission's rules. Unlike a proposed exchange of a commercial UHF channel for a vacant noncommercial educational UHF allotment, a case in which there is generally no party available to protect the interest in commencement and expansion of noncommercial educational service on the allotment, under this procedure the permittee or licensee of the noncommercial educational channel is a party to the proceeding and can determine whether the exchange is in the best interest of its station. In this case, petitioners have shown that approval of the exchange will permit the expansion of WRES' service area and will provide first noncommercial educational television service to more than 18,000 people.

19. We believe it is proper to consider the specific transmitter site proposed by Press because, as we noted in the *Notice*, Press would be the only eligible applicant for the allotment. Furthermore, Press has provided us with an assurance that this site remains available.[5] Press has demonstrated, through use of the terrain roughness cor-

rection factor supported by field strength measurements, that it can place a city grade signal over Clermont from this site.[6] Press' alleged failure to discuss a previous engineering statement does not imply that Press' engineering studies are invalid, nor does it imply that Press' statements were made in bad faith. Our analysis of Press' engineering studies indicates that Press can place an acceptable signal level over Clermont from its specified site. As for Rainbow's contention that Press' transmitter site could cause interference with Rainbow's transmitter, we note that Rainbow provided no details of its allegations. Furthermore, this type of interaction is generally a concern of the parties involved and the owner of the tower on which the antennas are to be mounted and, in any event, is properly resolved during the planning and implementation of the antenna installation.

20. We will not deny the exchange on the grounds that, following approval, BCC's service area will substantially overlap with CCI's service area. While CCI offers statistics suggesting that it will suffer a significant loss of viewers, it does not describe the basis for this claim. Furthermore, even if CCI runs the risk of losing viewers, we cannot prevent a channel expansion solely to protect a broadcaster from competition. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon.* 4 FCC Rcd 2276 (1989).

21. We find that, for purpose of Section 1.420(h) of the Commission's rules, Clermont and Cocoa are in substantially the same market. According to petitioners' maps of the proposed coverage areas of noncommercial Channel 68 and commercial Channel 18, the predicted Grade B signal of Channel 68 will fall completely in the predicted Grade B signal of Channel 18. While there may currently be little overlap of the stations' signals, this appears to be due to the fact that neither station is operating at full power. Once the channel exchange is approved and expanded service is instituted, both channels will clearly serve substantially the same market.

22. Allegations that Press intends to effectively change the community of license of WKCF are meritless. WKCF is licensed to Clermont and owes its primary service obligation to that community regardless of its transmitter site. *See* 47 CFR 73.1120. Press has stated that it will continue to serve its community of license.

23. We need not explore the propriety of Press' alleged acquisition of WRES from Glorious Church and its subsequent assignment to BCC, Press' financial involvement with the station, or Press' negotiation of an exclusive right to propose a channel exchange with Glorious Church, and the transfer of that right to BCC. Press' involvement with WRES, BCC, and Glorious Church was fully disclosed to, and examined by, the Commission in connection with our consent to the assignment of WRES to BCC. Contentions of impropriety are, therefore, untimely. The sole piece of new evidence offered to support a claim of impropriety is a newspaper article stating that Press "recently bought Cocoa station WRES-TV." Even if the existence of this article had been timely raised, we do not believe that it would have constituted sufficient grounds for reexamining Press' actions. A newspaper article is not an acceptable substitute for the Section 309(d) requirement that allegations in a petition to deny must be supported by the affidavit of a person with personal knowledge of the facts alleged. *See Mississippi Authority for Educational Television*, 79 FCC 2d 577, 579 (1980). Furthermore, after considering of the article in its entirety, as well as documents submitted by Press, BCC and Glorious Church before the assignment of WRES, we find that the use of the word "bought" reflects the reporter's mischaracterization of the legal form of the transaction. Therefore, we do not believe that a closer examination is warranted.

24. Finally, we will not weigh the existence of a LPTV station in the public interest calculus. We do not consider the effects of an allotment action on LPTV stations in television allotment proceedings because LPTV is considered to be a secondary service. *See* 47 CFR 74.702(b), 74.703(b).

25. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's rules, IT IS ORDERED, That effective **January 12, 1990,** the Television Table of Allotments, Section 73.606(b) of the Commission's rules, IS AMENDED, with respect to the community listed below, as follows:

| Community | Channel No. |
|---|---|
| Clermont, Florida | 18- |
| Cocoa, Florida | 52, *68 |

26. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Brevard Community College, for Station WRES(TV), Cocoa, Florida, IS MODIFIED to specify operation on Channel *68, in lieu of Channel *18-, and the permit of Press Television Corporation for Station WKCF(TV), Clermont, Florida, IS MODIFIED to specify operation on Channel 18- in lieu of Channel 68, subject to the following conditions:

(a) Within 90 days, the permittees shall file with the Commission minor change applications for construction permits (Form 301 or 340), specifying the new facilities;

(b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620 of the Rules, however, coordination should occur so that both stations do not broadcast on the same channel simultaneously;

(c) Each station may continue to operate on its authorized channel for up to one year from the effective date of this decision; and

(d) Nothing contained herein shall be construed to avoid the necessity of filing an application to change the transmitter location or an environmental impact statement pursuant to Section 1.1301 of the Rules.

27. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to Brevard Community College, 4701 East Hanna Avenue, Tampa, Florida, 33610, and Press Television Corporation, 2000 W. Glades Road 206, Boca Raton, Florida, 33431.

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

29. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## FOOTNOTES

[1] Press cites to *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations ("Channel Exchange Procedure Report and Order")*, 59 RR 2d 1455 at note 14 (1986), in support of its claim.

[2] Rainbow asserts that the exchange would deprive third parties of the right to compete for the newly unrestricted Channel 18, in contravention of *Ashbacker v. FCC*, 326 U.S. 327 (1945). We fully examined the *Ashbacker* aspects of Commission rule 1.420(h) in the *Channel Exchange Procedure Report and Order*. Because Rainbow offers no explanation as to why we should revisit our analysis, we decline to do so.

[3] As Press notes in its reply, the Commission abandoned its *de facto reallocation policy in Suburban Community Policy, Berwick Doctrine and DeFacto Reallocation Policy*, 93 FCC 2d 436 (1983).

[4] The *Channel Exchange Procedure Report and Order* expressly states that one of the benefits of this procedure is that noncommercial educational stations may receive consideration for exchanges that permit them to improve the quality of their facilities.

[5] However, this does not mean that Press has been granted approval to operate from that site. Press must file a minor change application for a construction permit specifying the new facility, and the Commission must grant the permit. Our consideration of the site herein is limited to the question of compliance with Section 73.685 of the Commission's rules which requires city grade coverage of a station's community of license.

[6] We base our determination on the exact site, height above average terrain, and ERP toward Clermont that Press proposed in its petition. We will construe any change at the application stage as a request for city grade coverage waiver, requiring full justification, including a specific showing that no other suitable sites are available that could provide a better signal to Clermont, as well as submission of at least three evenly spaced terrain profiles to Clermont, and the topographic maps from which they were derived.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 87-338**

In re Applications of

| | |
|---|---|
| SALINAS BROADCASTING LIMITED PARTNERSHIP, A California Limited Partnership | File No. BPH-860917MC |
| ARTICHOKE BROADCASTING CORPORATION | File No. BPH-860917MG |
| B.F.J. TIMM | File No. BPH-860918MI |
| SOUTHERN CALIFORNIA BROADCASTING COMPANY | File No. BPH-860918NO |
| CRYSTAL COMMUNUCATIONS, INC. | File No. BPH-860918NZ |
| Julio A. Villamil, Maria Elena Villamil, Lawrence M. Wrathall and Nayereh E. Wrathall d/b/a VILLAMIL FM RADIO | File No. BPH-860918OL |
| CALIFORNIA COMMUNITY TELEVISION NETWORK | File No. BPH-860918OO |

For Construction Permit for a New Commercial FM Station at Salinas, California

## MEMORANDUM OPINION AND ORDER

**Adopted: November 16, 1989; Released: November 28, 1989**

By the Review Board: MARINO (Chairman), BLUMENTHAL, ESBENSEN.

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 2762 (1989) (" *I. D.* "), of Administrative Law Judge Edward Luton (ALJ) granting the application of Artichoke Broadcasting Corporation (Artichoke) for a Construction Permit to establish a new FM broadcast station at Salinas, California. Exceptions were filed by five competing applicants: Salinas Broadcasting Limited Partnership (Salinas), Southern California Broadcasting Company (SCBC), Crystal Communications, Inc. (Crystal), Villamil FM Radio (Villamil), and California Community Television Network (Community). The ALJ held that Artichoke prevailed on the standard comparative issue over its closest rivals, Salinas and Villamil, solely because of its superior comparative signal coverage. After reviewing the *I. D.* in the light of the exceptions and replies filed by the various applicants, the oral argument held October 4, 1989, and our own independent examination of the record, we request the views of the Mass Media Bureau on Villamil's exceptions that a remand of the proceeding is necessary to determine whether the other applicants have reasonable assurance of their commonly-proposed transmitter site. The *I. D.* also denied the competing application of B.F.J. Timm. Because Timm has not filed exceptions, its application will be dismissed pursuant to 47 CFR §1.276(f).

### BACKGROUND

2. All the remaining applicants (save Villamil) proposed a transmitter site located in the Buena Vista hills, approximately 5 miles South of the center of Salinas, California, and adjacent to (or part of) Toro Regional Park. *See, e. g.*, Artichoke Application (FCC Form 301), filed September 17, 1986, Exh. E (Engineering Statement) at Figure 2C and Exh. E-1 (Environmental Impact Information) at 1. In response to Question 16 of its application form, Artichoke admitted that its application proposed a "major environmental action" pursuant to Section 1.1305 of the Rules. It therefore was required by the pertinent Instructions for FCC Form 301 to submit an "environmental assessment" detailing its proposed facilities, discussing any expected adverse environmental effects or consequences caused by its proposal, and, in particular, containing:

> A statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect; and
>
> A statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community.

Section 1.1311 of the Rules enumerates the information required in "environmental assessments." The Instructions to FCC Form 301 closely track these specific regulations.

3. In response to these requirements, Artichoke's application contained an environmental statement detailing, in pertinent part, that:

> The land area is uninhabited and not used for any purpose. Construction of the proposed tower will not require a change in the contour of the land . . .
>
> * * *

> The proposed tower will not be located on property listed in the National Register of Historic Places or in a local or state version thereto . . . .
>
> * * *
>
> The proposed facility will be in compliance with State and Local Environmental Regulations and the necessary zoning and building permits will be obtained . . . prior to construction of the tower.

*Id.*, Exh. E-1. However, Artichoke did not supply either of the necessary statements concerning "zoning" or the presence or absence of "local controversy" surrounding the proposed site. Similarly, SCBC and Community checked "yes" on their amended application forms that a major environmental action was proposed. Nevertheless, SCBC claimed that its proposal "has not been the subject of controversy on environmental grounds in the local community," SCBC Amendment filed November 24, 1986, Exh. V-B-3 (A). Community asserted that its proposed site "is not a subject of controversy locally on environmental grounds, . . . is believed to comply fully with all local land use policies, [and] is not believed to be near any officially designated wilderness area . . . or any scenic . . . significant feature." Community Amendment filed November 14, 1986, Exh. D at 4. The other applicants, Salinas and Crystal, claimed that their proposals were not major environmental actions requiring submission of environmental assessments. Salinas claimed that:

> No environmental impact is involved since the proposed site . . . is not located in or near any known wilderness and/or wildlife areas, historic and/or scenic areas . . . .

Salinas Amendment filed March 18, 1988, Exh. EE-6 (Engineering Statement) at 4. Crystal stated that because its proposed antenna structure is less than 300 feet above ground level (it is 298 feet), it would not have major environmental impact. Crystal Application (FCC Form 301), filed September 18, 1986, Section V-B, Question 16.

4. However, on April 21, 1988, Villamil filed a Petition to Enlarge Issues to add site availability issues against all the other applicants, claiming that their commonly-proposed Buena Vista site violates the Monterey County General Plan and the Toro Area Master Plan ordinances and, therefore, is unlikely to receive local approval prerequisite to tower construction. In particular, Villamil alleged that the proposed site is strongly opposed by the Monterey County Planning Department as inconsistent with local ordinance restrictions on ridgeline development and visual impact, by the Monterey County Airport Land Use Commission and the Manager, Salinas Municipal Airport as creating excessive noise and safety hazards, and by a local property owners association and several local residents as an unacceptable obstruction to the scenic landscape. These allegations were supported by a personal knowledge affidavit of Lawrence M. Wrathall, a Villamil general partner, and by correspondence between Wrathall and officials of the various local governmental organizations mentioned above.

5. On May 9, 1988, the competing applicants jointly opposed the Villamil petition, pointing out that: (1) conditional use permits are issued by the Monterey County Planning Commission; (2) the role of the governmental organizations which Villamil contacted is merely to advise the Planning Commission, and not to decide whether to grant a permit, and Villamil has not shown that the Planning Commission would disapprove of the Buena Vista site; and (3) Commission precedent does not require pre-grant zoning approval, but instead assumes that approval will be obtained absent indications that it is unlikely to occur. No comments were filed by the Mass Media Bureau.

6. Villamil replied on May 18, 1988, that it had sufficiently demonstrated that such approval is unlikely and that the competing applicants failed to advise the Commission of this local environmental controversy. In support, it attached a May 13, 1988 letter from the Chairman of the Monterey County Board of Supervisors, which appoints members to the Planning Commission and has appellate jurisdiction over its decisions. This letter concluded that the Buena Vista site is "very likely not to be approved because of the requirements of the Toro Area Master Plan." It further explained:

> [T]he Toro Area Master Plan is an adopted ordinance of the County of Monterey and thereby has the force of law within our jurisdiction. Waiver of mandated policies within the Toro Master Plan is not possible and will not be considered.
>
> It is also very important that the Monterey County Airport Land Use Commission approve any proposed antenna site, as denial by that commission will preclude any such development.

7. By *Order*, FCC 88M-3025, released September 14, 1988, the ALJ denied Villamil's petition, ruling that although "Villamil ha[d] shown . . . that any requests to the Planning Commission for the use of a transmitter site are very likely to be opposed, perhaps strenuously," it had not submitted any indication from the Planning Commission itself that approval was unlikely. Therefore, the ALJ ruled, Villamil had failed to prove such approval was unlikely.

## DISCUSSION

8. It is long-standing Commission policy that a site availability issue will not be specified based on the lack of advance approval of local governmental authorities, unless a "reasonable showing" is made by a petitioner which demonstrates that such approval is improbable. *Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 519 (1986); *San Francisco Wireless Talking Machine Co., Inc.*, 47 RR 2d 889, 893 (1980); *Alden Communications Corp.*, 102 FCC 2d 518, 520 (Rev. Bd. 1985); *Gainesville Media, Inc.*, 59 FCC 2d 382, 385 (Rev. Bd. 1976); *Edward G. Atsinger, III*, 29 FCC 2d 443, 451 (Rev. Bd. 1971); *John Hutton Corp.*, 27 FCC 2d 214, 215 (Rev. Bd. 1971); *El Camino Broadcasting Corp.*, 14 FCC 2d 361, 363 and 12 FCC 2d 329, 330 (Rev. Bd. 1968). Recently, in revising its rules implementing the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, the Commission noted that:

> [A]esthetic concerns may more appropriately be resolved by local, state, regional or local land use authorities. Those authorities can better handle such

> questions given their experience and familiarity with land use values. Accordingly, in considering any objections based upon aesthetic concerns, due recognition and considerable weight will be accorded to the fact that site approval has been obtained from a local, state, regional or federal land use board or agency, if that approval has taken into account the environmental impact of the proposal.

*Environmental Rules* (Report and Order), 60 RR 2d 13, 17-18 (1986) (footnotes omitted). Thus, the Commission "encourage[s] applicants to seek approval from the appropriate land use agency prior to coming to the Commission." *Id.* at 17 n.16. Further, the Commission emphasized that:

> For licensing purposes, environmental factors may be deemed qualifying and/or comparative issues, and will be evaluated with any other factors that are relevant to determining whether grant of an application is in the public interest. In a hearing context, the Administrative Law Judge will evaluate and give due weight to the environmental and nonenvironmental public interest factors in rendering his or her determination . . . . As a routine matter, applicants are encouraged to amend their applications to reduce, minimize or eliminate potential environmental problems.

*Id.* at 16 (citation and footnotes omitted).

9. Here, the interaction of three significant factors suggests that a remand may be necessary. First, Villamil has shown that local governmental authorities (county Planning Department and county Airport Land Use Commission) firmly oppose the Buena Vista site and that, as a result of such opposition, the Chairman of the local Board of Supervisors, which appoints the local decision-making Planning Commission and reviews its decisions, views approval of the site as highly improbable. This showing by itself may be sufficient to raise a substantial and material question of fact as to site availability. *Compare Teton Broadcasting*, 1 FCC Rcd at 520 (site availability issue added where site disapproved one year earlier and composition of local board remained unchanged) *and El Camino*, 14 FCC 2d at 363 (issue added where petitioner's site on same general plot was disapproved) *with Alden Communications Corp.*, 3 FCC Rcd 3937, 3938 (1988) (government willingness to entertain a request for use of its own land may be sufficient to provide reasonable assurance of site availability; there was no showing that such request would likely be denied); *San Francisco Wireless*, 47 RR 2d at 893 (no issue added where applicant had not yet sought local approval but petitioner failed to specifically show improbability of approval); *Gainesville Media*, 59 FCC 2d at 385 (no issue added where petitioner did not show that local officials were reluctant to grant zoning variance); *Atsinger*, 29 FCC 2d at 450-451 (sole reliance on opinion of one of a ten-member zoning commission was inadequate where record showed that full commission disapproved of individual members issuing such opinions and would consider the zoning request); *and Hutton*, 27 FCC 2d at 215-216 (local officials' disclaimers that neither can authorize site approval are insufficient; no issue added).

10. Second, and independent of pure "zoning" considerations, the Commission has indicated the importance of appropriately considering environmental public interest factors and has specifically allowed for parties to raise such matters pursuant to Section 1.1307(c) and (d) of the Rules. *Environmental Rules*, 60 RR 2d at 17. It has urged applicants to seek prior local approval. *Id.* at n.16. Villamil appears to be the only applicant in this proceeding which, as mandated by the Commission, has consulted local authorities in its site selection process, and it has raised the local officials' environmental concerns in its enlargement petition. Third, site selection is critically important to the resolution of the standard comparative issue in this case, because the decisionally determinative comparative signal coverage preference awarded by the ALJ hinges upon it. *Cf. W.S. Butterfield Theatres, Inc. v. FCC*, 237 F.2d 552 (D.C. Cir. 1956).

11. The above facts and circumstances alleged in Villamil's petition were not before the Bureau when it processed the subject applications, it did not comment on the petition raising these matters, and its reply to exceptions does not address them. Further, the Board has located no precedent in which a case was remanded on a site issue because of local environmental and aesthetic concerns, since environmental issues are routinely addressed in the hearing designation order and subjected by the Bureau to the Commission's orderly environmental processing procedures. *See Environmental Rules*, 47 CFR §1.1301 *et seq. See also Seattle Public Schools*, 103 FCC 2d 862, 869 (1986) (hearing designation order); *Golden State Broadcasting Corp.*, 71 FCC 2d 230 (1979)(same). Despite the fact that several of the subject applicants signified environmental concerns pertaining to the Buena Vista site when they filed, no relevant site issues were designated. *Hearing Designation Order*, 2 FCC Rcd 5254 (1987). Because the Bureau is the presumptive expert on, and administrator of, the Commission's broadcasting environmental rules, we request its views on whether a site availability issue, based on zoning or environmental grounds, should be added on the new facts here presented. *See generally Edens Broadcasting, Inc.*, FCC 88I-016, released March 8, 1988 (Bureau's expert views requested).

12. ACCORDINGLY, IT IS ORDERED, That the application of B.F.J. Timm (File No. BPH-860918MI) IS DISMISSED with prejudice; and

13. IT IS FURTHER ORDERED, That the Mass Media Bureau SHALL HAVE twenty (20) days to file comments as hereinabove discussed, and the applicants SHALL HAVE ten (10) days thereafter to file reply comments.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-304**

In re Applications of

REBECCA L. BOEDKER File No. BPH-870827ML

WILLIAM PHILLIP ZURICK File No. BPH-870827MN

For Construction Permit for a
New FM Station Northumberland, Pennsylvania

**Appearances**

*Bruce A. Eisen, Esq.* (Kaye, Scholer, Fierman, Hays and Handler) on behalf of Rebecca L. Boedker; *William H. Crispin and Dean R. Brenner, Esqs.* (Verner, Liipfert, Bernhard, McPherson and Hand, Chartered) on behalf of William Phillip Zurick; *Julian P. Freret and Christopher D. Imlay, Esqs.* (Booth, Freret and Imlay) on behalf of Charles W. Loughery; and *Paulette Laden, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ACTING CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY**

**Issued: November 21, 1989; Released: November 28, 1989**

**PRELIMINARY STATEMENT**

1. *Hearing Designation Order*, 53 Fed. Reg. 25673, published July 8, 1988 (DA 88-902, released June 30, 1988), set for hearing three mutually exclusive applications of Rebecca L. Boedker (Boedker), William Phillip Zurick (Zurick) and Charles W. Loughery (Loughery) on two original issues: an air hazard issue affecting Zurick (resolved in Zurick's favor by *Memorandum Opinion and Order*, FCC 89M-310, released January 30, 1989) and the standard comparative issue. By *Memorandum Opinion and Order*, FCC 89M-2201, released September 1, 1989, Loughery's application was dismissed following approval of a settlement agreement between Loughery and Zurick.

2. By *Memorandum Opinion and Order*, FCC 88M-4360, released December 23, 1988, two qualifying issues were added against Boedker:

> (a) To determine whether Boedker violated Section 311(e)(3)(b) of the Communications Act of 1934, as amended, or Rule 73.3525 (47 CFR 73.3525) by filing an application for a construction permit with the sole purpose of receiving a monetary settlement.
>
> (b) To determine whether under the evidence adduced under (a) above, Boedker engaged in an abuse of process.

Zurick was assigned the burden of proceeding on these issues, but the burden of proof was assigned to Boedker. *Id.*

3. *Memorandum Opinion and Order*, FCC 89M-719, released March 6, 1989, added the following qualifying issues against Boedker:

> (a) To determine whether Boedker failed properly to disclose or made a misrepresentation to the Commission concerning the financial involvement of her husband, Jens Erik Boedker, in her application.
>
> (b) To determine whether the involvement of Jens Erik Boedker, a citizen of Denmark, in the application of his wife, Rebecca Boedker, constitutes a violation of Section 310(b) of the Communications Act of 1934, as amended.
>
> (c) Whether under the evidence adduced under (a) and (b), Boedker is qualified to be a Commission licensee.

The burden of proceeding with the introduction of evidence under these added issues was assigned to Zurick; the burden of proof was again assigned to Boedker.

4. Also, *Memorandum Opinion an Order*, FCC 89M-1054, released April 3, 1989, added a further qualifying issue against Boedker:

> Whether Boedker falsely certified and misrepresented facts to the Commission concerning her financial qualifications to build and operate a radio station at Northumberland, Pennsylvania, and under the evidence adduced thereunder, whether Boedker is qualified to be a Commission licensee.

Again, the burden of proceeding was assigned to Zurick, but the burden of proof was assigned to Boedker. *Id.*

5. Hearings on above issues were held on April 18, and 19, 1989. The two surviving parties filed timely Proposed Findings of Fact and Conclusions of Law on September 11, 1989; Reply Findings were filed on September 25, 1989 by Boedker and by letter, October 12, 1989, Zurick confirmed that it did not file Reply Findings. The Mass Media Bureau, as is its custom on mainly comparative matters, limited its participation principally to consideration of comparative coverage, areas and population.

6. For the reasons hereinafter, this, as an Initial Decision, SHALL GRANT the application of William Phillip Zurick.

**FINDINGS OF FACT**

**CERTIFICATION AND FINANCIAL ISSUES (BOEDKER)**

7. As an individual applicant Boedker certified her financial qualifications to construct and operate her proposed station, that is, she had sufficient net liquid funds on hand or available to construct and operate her proposed facilities for three months without revenues. (Boedker Ex. 1; Tr. 131); and relies on a $250,000 bank letter from the Commonwealth Bank, dated August 12, 1987 at the time of her certification (Tr. 132).

8. Boedker's gross income for year 1987 was $625 and for year 1988 was less than $5,000 (Tr. 114). In her first bank commitment letter for Commonwealth Bank and Trust Company, Lewisburg, Pennsylvania, the bank officer, Ross Chrisman, signed a letter in the amount of $100,000 on August 10, 1987 (Tr. 49, 52, 56), albeit he knew no details of her financial status, assets or liability or of her employment (Tr. 53, 54). This letter relates the "willingness" of the bank "to entertain a loan request" but states it "is not a formal commitment." The actual bank letter differs in language with a sample letter proposed by Boedker's counsel, a matter which caused Boedker to consult with counsel concerning the amount of $100,000 and the qualifying language of the bank's merely "willing to entertain a loan request" (Tr. 147).

9. Boedker went back to see Chrisman on August 12, 1987, asking for a bank letter for $250,000 with stronger language (Tr. 57-59, 151- 152). Boedker did not tell Chrisman on this visit that she had a problem with the language of the August 10, 1987 bank letter (Tr. 149). In light of her deposition testimony, she admitted that she did tell him she had a problem with the language (Tr. 150-151). She told Chrisman that she had a problem with the word "entertain"--she wanted that word deleted (Tr. 151-152).

10. When she asked for $250,000, Chrisman, in turn, asked her to provide a business plan, CPA proposals, projections, personal income tax returns, and financial statements (Tr. 59). At this meeting, Boedker and Chrisman did not discuss her income, assets or liabilities (Tr. 61). As of August 12, 1987, Chrisman had no information about Boedker's financial condition. *Id.* On or about August 12, 1987, Chrisman signed a bank letter for $250,000 for Boedker (Tr. 62).

11. The August 12, 1987 bank letter (Zurick Ex. 5) provided that:

> . . . the Commonwealth Bank and Trust Company, N.A. has an interest in extending a loan request to your company in the amount of up to Two Hundred and Fifty Thousand Dollars

and states further that the letter is not a commitment, but is:

> rather an expression of interest in the project and a tentative plan of structuring the financing based upon the information provided.

12. Boedker did not tell Chrisman anything about herself to get the $250,000 bank letter (Tr. 152).

13. Boedker was advised by counsel that the phrase in the August 12, 1987 bank letter that "please be advised that the Commonwealth Bank and Trust Company has an interest in extending the loan request to your company" was not "perfect" (Tr. 160). Chrisman did not employ the language of the sample bank letter when he wrote the August 12, 1987 bank letter because there was "some interest on our part to proceed with the loan request pending receipt of the necessary information, and then we would proceed on" (Tr. 65).

14. The August 12 letter was an accommodation letter (Tr. 67). The Commonwealth Bank did not have a present firm intention to loan Boedker $250,000 on August 12, 1987 (Tr. 66). They stated merely that they would work with Boedker on reviewing her information and see if a package could be put together. *Id.*

15. When he signed the August 12 letter, Chrisman thought Boedker was in the process of putting together the personal financial information and pro formas he requested (Tr. 61, 64).

16. Boedker knew that start-up radio stations are "delicate" and have high mortality rates, but she never thought that her station would be unprofitable (Tr. 155). She knew at some point that she would have to produce her financials to get a $250,000 loan, and thought she would get the loan because banks do not make decisions simply on financials and the bank letter said she would get the loan (Tr. 142, 157- 158).

17. In August 1988, Boedker applied to the Commonwealth Bank through Chrisman for an $80,000 to $100,000 loan for her application (Tr. 68-71). Boedker brought her husband Jens Boedker to a meeting with Chrisman in late July or early August 1988 concerning this loan (Tr. 71). Boedker told Chrisman that the purpose of the loan was to cover start-up costs, attorney's fees and application fees incurred in the prosecution of her application (Tr. 69). Chrisman filled out a loan application form for the Boedkers based on the information she provided (Tr. 69-70; Zurick Ex. 6).

18. Chrisman asked the Boedkers for personal financial statements and joint federal income tax returns (Tr. 71-72). From that information, Chrisman learned the Boedkers' income, assets and liabilities (Tr. 72; Zurick Ex. 7 and 8; Tr. 161). This is the first time that Boedker gave the bank any information about her financial status (Tr. 161).

19. Originally, the loan was requested only for Boedker, but when Chrisman reviewed the submitted financials, he learned that Jens Boedker earned the majority of the family income in 1987 (Tr. 76). Chrisman required both Mr. and Mrs. Boedker's names to be on the loan because Mr. Boedker earned $90,000 in 1987 and Boedker earned only $625. (Tr. 76).

20. Even though a loan in the range of $80,000 to 100,000 was requested, the Boedkers only qualified for a loan of $21,000, based upon Chrisman's review of their financial information (Tr. 78.)

21. Alone, Boedker would not have qualified for a $250,000 loan in 1988 (Tr. 80). Had she applied alone, she would have qualified for very little, if anything (Tr. 79). Based on his 14-year career as a banker, Chrisman has never known someone with a gross income of $625 who qualified for a $250,000 loan (Tr. 101).

22. Boedker admitted that she had to rely on her husband's income to qualify for the $21,000 loan (Tr. 123). She knew that her salary was inadequate for such a loan and that she would not have qualified individually for the $21,000 loan (Tr. 123). Mr. and Mrs. Boedker pledged all of their property, excluding a vacant building in which the bank was not interested, to secure the $21,000 loan (Tr. 124- 125).

23. Boedker denied that she knew in 1988, after only qualifying for a $21,000 loan with her husband's assistance, that she, individually, would not qualify for a $250,000 loan from the same bank (Tr. 162). She claimed she "never connected those two incidents . . ." (Tr. 162).

24. Boedker attended Chrisman's deposition in February 1989 when he stated that the bank letter of August 12, 1987 was an accommodation letter (Tr. 165). Boedker admitted that Chrisman had no animus toward her, and confirmed that Chrisman had provided a declaration on her behalf when she was accused of filing her application solely for the purpose of receiving a settlement (Tr. 166, 210).

25. Instead of approaching Chrisman, Boedker visited a local bank, the Northern Central Bank (which she had previously visited to obtain a bank letter) (Tr. 170). This bank asked her for personal financial status and income tax returns; after she provided this information, the bank informed her that it was not interested (Tr. 171). She told her counsel that she was having some difficulty in making arrangements for a bank letter (Tr. 172).

26. Her counsel recommended a bank in Baltimore with which she had no prior banking relationship (Tr. 172). The only thing she knew about the bank was that "they were broadcast bankers" (Tr. 172). She secured a bank letter from this bank after providing them with personal financial statements and income tax returns (Tr. 173).

***Issues: Failure to Disclose and Misrepresentation Concerning Involvement of Her Husband, Jens Erik Boedker, in Her Application and Alleged Alien Ownership Section 310 (b) of the Commission's Act of 1934, as Amended (Boedker).***

27. Jens Erik Boedker is Boedker's husband, and a citizen of Denmark (Zurick Ex. 10). In her application, Boedker claimed that it was possible that funds earmarked for the prosecution of the application will be provided by an alien but that no construction funds will be provided by any alien once the construction permit is granted. *Id.* Boedker's application was filed on August 27, 1987, the year her gross income was $625 (Tr. 118).

28. In a pleading filed November 29, 1988, Boedker submitted a declaration claiming that "I'm personally paying for my own expenses for the application process" (Tr. 120). This declaration and pleading were filed in Opposition to a Motion to Enlarge Issues claiming that she filed her application solely to get a monetary settlement (Tr. 118-120).

29. In June of 1988, Jens Boedker gave his wife $3,000 to help her pay the Commission's hearing fee (Tr. 234). Currently, Mr. Boedker has expended $10,000 of his money on the application (Tr. 233).

30. The Boedkers received funds from the $21,000 loan they got from the Commonwealth Bank in September 1988 (Tr. 124). About $9,000 of that loan has been spent prosecuting the Northumberland application (Tr. 235).

31. Mr. Boedker filed a declaration in this proceeding in support of an Opposition to Motion to Enlarge Issues alleging that he (an alien) was involved in his wife's application financially (Tr. 244, 255, 246; Zurick Ex. 14).

32. His declaration makes no mention of the financial assistance he was providing his wife (Zurick Ex. 14). It does reference the fact that the Boedkers jointly applied for a loan from the Commonwealth Bank, some of which funds were used to prosecute her application, but it also states that "other costs for prosecution of the application have been paid by my wife from her own personal account." *Id.*

***Section 311 (e) (3) (b) Issue (Boedker)***

33. After this case was designated for hearing, a newspaper article entitled *Woman Makes Offers in Bid to Operate Radio Station* appeared in a local newspaper, *The Daily Item* of Sunbury, Pennsylvania (Tr. 105-106; Zurick Ex. 9). Boedker had a discussion with a Ms. Ann Murakami, a reporter for the Ottaway News Service, a service that provides news stories for 23 newspapers, including *The Daily Item* (Tr. 105; Zurick Ex. 13). Ms. Murakami conducted a telephone interview with Boedker in October 1988. *Id.*

34. Ms. Murakami took notes of this conversation in order to recall accurately the statements being made by Boedker (Zurick Ex. 13). Based on her notes, Ms. Murakami drafted and prepared an article that was published in *The Daily Item* on October 27, 1988. *Id.* The information contained in this article reflects the statements made by Boedker during the interview. *Id.*

35. The article reports that Boedker told Ms. Murakami that she would accept a $250,000 offer for her application if she were offered that sum, depending on the terms (Zurick Ex. 9). Boedker denies making that statement to Ms. Murakami (Tr. 107).

36. Boedker denied a number of statements that the newspaper article attributed to her. She denied saying "if I made that statement (referring to her willingness to accept the $250,000 offer), and I surely did, then I would take it only because I keep my word" (Tr. 108; Zurick Ex. 9). She denied telling Ms. Murakami that she only set the bottom line price because Zurick had asked her what her figure to get out of it was. *Id.* Boedker denied saying "I set the figure so high because I knew no one positively pay me that." *Id.*

37. Boedker read the article when it was published and called her lawyer because, she claimed, she was very upset (Tr. 109). She did not call Ms. Murakami and cannot recall if she called anyone else at the Ottaway New Service to express her feelings about the article (Tr. 110).

***Standard Comparative Issues (Boedker)***

***Diversification (Boedker)***

38. Boedker holds no ownership interest in any media mass communications.

***Quantitative Factors***

39. Boedker is a sole proprietress. Boedker proposes to work minimum of 40 hours per week at the proposed station as general manager having the primary responsibility for recruiting, planning and carrying out her organizational structure. She will be closely involved in the recruiting and hiring of her personnel and will supervise the execution of duties by management personnel and staff. She will terminate any employment should she receive the grant here (Boedker Ex. 1, p. 4).

***Qualitative Factors***

40. Boedker is a female person and from 1957 to 1962 has resided in Sunbury, Pennsylvania, which is adjacent to Northumberland (Tr. 264). In 1962 she moved to Point Township, Pennsylvania also adjacent to Northumberland. From 1962 to 1980, she lived there, a community within the 3.16 mV/m of her proposed station (Boedker Ex. 1, p. 1); from 1980 to 1981 she lived in Lewisburg, Pennsylvania,

approximately seven miles from Northumberland. She presently resides in Northumberland with her husband and two children; for a short time, July 1986 - March 1987, she lived in a condominium in McGaheysville, Virginia (Tr. 265; Boedker Ex. 1).

41. Boedker has been a member of Concerned Citizens for Neighborhood Schools since 1985 (Boedker Ex. 1 and 2), a grassroots organization with members from Northumberland and Sunbury (Tr. 266). This group does not meet regularly; approximately once per month, she attends meeting or performs Executive Committee functions (Tr. 267). In the fall of 1988, she wrote and produced advertisements for the group. *Id.*

42. Boedker was a volunteer for the Mary Derr Rockefeller Auxiliary to the Sunbury Community Hospital in early 1985. She presently pays dues to this group, and and answers questions from them about advertising (Tr. 270). Also in 1985, she taught a Vacation Bible School at the First Presbyterian church of Sunbury, where she has been a member since the late 1970's. She has also been a member of a local PTA from 1982 to the present (Boedker Ex. 1 at 2).

43. From 1975 to 1977, Boedker was a volunteer, part-time announcer at WBSC, the Bloomsburg State College radio station (Tr. 272- 273; Boedker Ex. 1 at 3). From 1979 to 1981, she worked at WMLP(AM) and WOEZ(FM), as part-time announcer and ultimately as a full-time announcer (Boedker Ex. 1 at 3). From 1983 to early 1984, she did voice-over work for radio, television and industrial films. *Id.* She was not hired by broadcast stations, but rather by advertisers or advertising agencies (Tr. 275; Boedker Ex. 1 at 3).

44. In 1984, she worked at WFXX(AM) and (FM) in South Williamsport, Pennsylvania with on-air announcing and production responsibilities, and since 1985, she has continued to write commercials, perform voice-overs and produce radio commercials for advertisers or advertising agencies (Boedker Ex. 1 at 3).

*Diversification Zurick)*

45. Zurick has no ownership interest in any medium of mass communications (Zurick Ex. 1 at 1).

*Quantitative Factors (Zurick)*

46. Zurick, a sole proprietor applicant, proposes serving on a full-time basis, at least 40 hours per week, as the general manager of his proposed station (Zurick Ex. 1 at 1; Tr. 297). As general manager, he will have ultimate authority for the management of the station and will supervise all station employees (Zurick Ex. 1 at 1). He will "be in charge of the station and have the last say on anything that goes on . . ." (Tr. 318). He will not have any employment other than as general manager of the station Zurick (Ex. 1 at 2).

*Qualitative Factors*

47. Zurick has lived in the 1 mV/m contour of his proposed station for more than 60 years and is unmarried (Tr. 297; Zurick Ex. 1). For the past six years, he has lived in the city of Sunbury, Pennsylvania (Zurick Ex. 1 at 2; Tr. 293). For the preceding eight years, he lived in Rockefeller Townership, Pennsylvania (with a Sunbury, Pennsylvania postal address). *Id.* (Tr. 292). For 47 years, he lived in Zerbe Township, Pennsylvania (Zurick Ex. 1 at 2; Tr. 293, 295). From 1925 to 1927, he lived in Shamokin at an address on the borderline of the service contour of his station (Zurick Ex. 1 at 2). In 1947, he lived in Great Neck, Long Island for approximately six months. *Id.* at 3.

48. Zurick represented Northumberland County in five national Democratic Conventions (the 1960, 1964, 1968, 1970 and 1972 national conventions) as a delegate (Zurick Ex. 1 and 3). He was a treasurer of the Northumberland County Democratic Committee for about 25 years (beginning in the mid-1950's through the mid-1960's), and was also the finance chairman of that organization for many of those years, beginning in 1958 through the mid-1970's. *Id.* (Tr. 319).

49. Zurick was a candidate for Congress in 1970 for the 17th Congressional District, which includes the Borough of Northumberland (Zurick Ex. 1 at 3). He won the Democratic nomination, but lost the election. *Id.* Since 1984, Mr. Zurick has been a member of Governor Casey's Finance Committee responsible for raising funds from the South Central Pennsylvania area. *Id.*

50. He has been a member of St. Michael's church in the City of Sunbury for the past eight years, and for 47 years was a member of St. Patrick's Church in Zerbe Township. *Id.* He and his then wife were members of various parent-teacher groups, while his six children were attending local schools in the service area of his proposed station. *Id.*

51. For ten years beginning approximately in 1957, Zurick served as the Chairman of the Board of Selins Grove State School, a state school for the mentally retarded. *Id.* at 4. He was elected Chairman of the Board following his appointment by then-Governor Leader. *Id.* The school has 1,000 employees and 2,500 students for which his nine-person board was responsible. *Id.* He also was a member of the Northumberland County Chapter for Retarded Children for 25 years, from 1955 to 1980. *Id.*

52. Zurick was appointed by then-Governor Shapp to be a member of the Board of Trustees of Bloomsburg State University in 1971. *Id.* He as elected Chairman of the Board, a position he held for ten years. *Id.* Zurick joined the NAACP in 1956 and held his membership for approximately ten years.

53. Zurick was a member of the Knights of Columbus at the Shamokin Chapter for 20 years and reached the third degree. *Id.* He was a member from 1955 to 1975. *Id.* He is presently a member of the Loyal Order of Moose and has been a member for 35 years. *Id.* He as active in the Optimist Club of Shamokin for 20 years, 1955-1975. *Id.* His principal activity was devoted to raising funds for the benefit of activities for young men, such as the Soap Box Derbies. *Id.* He as member of the Chamber of Commerce of Shamokin for 10 years from 1977-1987. *Id.*

54. From 1984 to the present, Mr. Zurick has been a member of the Northumberland County Industrial Development Authority (appointed by the Northumberland County Commissioners), which is responsible for securing industry for the area. *Id.* at 5.

55. Zurick was appointed to the Northumberland County Redevelopment Authority in 1971 by the Northumberland County Commissioners. *Id.* He was elected Chairman and served in that capacity for ten years. *Id.* This group's principal responsibility was rebuilding downtown Milton, Pennsylvania following Hurricane Agnes and the resulting floods. *Id.*

*Comparative Coverage*

56. No significant difference exists in the number of persons to be served by the proposals of either party and the areas and populations to be served already receive primary aural service from five or more radio stations (Joint Ex. 1).

## ULTIMATE FINDINGS AND CONCLUSIONS

***Section 311 / Rule 73. 3525 Issue (Boedker)***

57. 47 U.S.C. Section 311(c)(3) provides:

> The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

58. The issue added by *Memorandum Opinion and Order*, FCC 88M- 4360, released December 23, 1988, contemplates inquiry whether Boedker filed her application with the sole purpose of receiving a monetary settlement.

59. An application filed for the purpose of reaching a settlement, and not for ultimately obtaining a construction permit, suggest deficiences in an applicant's character. *Inquiry Into Alleged Abuses of the Commission's Processes Applicants for Broadcast Facilities*, 65 RR 2d 91 (1988). And that conduct, if found, would be an abuse of process, a matter of serious concern with this agency. *GACO Communications Corp.*, 94 FCC 2d 761 (Rev. Bd. 1983).

60. The evidence discloses at the outset an affidavit of Ann K. Murakami, a newspaper reporter who interviewed Boedker in October 1988 for a news story Murakami had prepared for publication in a Northumberland area newspaper.

61. The article reports that "a Northumberland woman who vowed to fight to the end in her battle to start a local radio station said would give in to a rival for $250,000." That statement, if true, suggests that Boedker originally filed her application with the intent to "start a local radio station," but had subsequently changed her mind, intending to be bought out for $250,000. It relates, "at worst," says Boedker, that she would consider dismissing her application for an amount that she knew neither Zurick nor Loughery would pay, and that her position was tantamount to "saying not for a million'." Murakami reports that Boedker set a $250,000 price because she believed that neither competing applicant would be willing to pay such an amount, and she wished to show her commitment to the venture.

62. Murakami's story later in the news report, recites that "while Ms. Boedker has vowed she is in it till the end, she also said during the same interview that if offered $250,000 she would take it."

63. On the other hand, Boedker stated that Murakami was not an objective interviewer, that there was some unpleasantness during their conversation, and that Boedker ultimately requested Murakami to confer with communications counsel if she had a need for further information.

64. Other evidence in addition to the Murakami affidavit (Zurick Ex. 9) and Boedker's own testimony came from Ross M. Chrisman, a bank officer who had originally discussed the financing of Boedker's station. Chrisman, involved in the incipient stages of the application process, recited in his declaration (Boedker Ex. 3), that it was clear to him that Boedker's intent in securing bank financing was for the legitimate purpose of constructing and operating her proposed radio station.

65. The essence of the newspaper article, the prime mover of the added issue here in light of Chrisman's testimony as well as that of Boedker herself compels the conclusion, preponderantly, that she did not abuse the Commission processes or undermine the objects of Section 311(c)(e) of the Communications Act in the filing of her application, rather it appears, at most, that the reporter implicitly misconstrued a perhaps inartful comment or statement by Boedker during the telephone interview. Little more. The issue therefore must be resolved in her favor. *Cf. Agnew-Sachs Broadcasting*, 103 FCC 2d 899, 904 (Rev. Bd. 1986).

66. Were it not for the financial contribution of her husband, Jens Boedker, a citizen of Denmark, Mrs. Boedker's application could not have been successfully prosecuted. Mr. Boedker paid a full one-half ($3,000) of the hearing fee, and, all told, has spent approximately $10,000 on Boedker's application. He co-signed for $21,000 bank loan, of which Boedker spent at least $9,000 on her application. The evidence is persuasive that she could not have qualified for this loan by herself. Thus, the evidence is compelling that Mr. Boedker has provided the essential funding for the application.

67. Boedker's declaration of November 29, 1988 in which she represented that she was paying her expenses for the application process is not sustained in the evidence. To repeat, Mr. Boedker had paid $3,000 of the hearing fee in July of 1988, and expended other monies on the application. He had also co-signed the bank loan in September of 1988, process of which were expended as well as other monies on the application.

68. In sum, Mr. Boedker's financial involvement was substantial and without which she would not meet her financial qualifications. Also, though Mr. Boedker's alien status was admitted at the outset, its importance was inaccurately minimized. But even that inaccuracy does not rise to the level of intentional deceit underpinning misrepresentation. It appears simply Boedker vainly hoped that the alien status of her husband might easily be overlooked or treated as a *de minimis* matter. Inasmuch as Mr. Boedker has provided the applicant's principal funding, it is not credible that he will not fund any construction costs. Principally, because Boedker could not even qualify for a $21,000 loan without her husband's name and financial wherewithal. Thus, relying solely on her own resources, she cannot build and operate a new radio station without his financial contributions. That pervasive and extensive involvement on his part is tantamount, as controller of the purse, to the role of dominant principal of the applicant; indeed, without his active financial commitment and pledge, no lending institution would be willing to give its support to the Boedker application; the *de facto* ownership interest he will hold, would violate Section 310(b) of the Communications Act, 47 U.S.C. Section 310(b), albeit that his status may in the near future be favorably changed to that of naturalized citizen. Because

the Statute is quite clear and its object mandatory, a statutory violation has thus occurred and it is necessary to conclude that Boedker should be disqualified.

*Standard Comparative Issue (Boedker)*

69. Boedker having been disqualified under the Section 310(b) issue, nevertheless, inasmuch as this not always being the last word, and for a fuller consideration by possible appellate levels, the criteria underlying comparative considerations need be addressed. There is no evidence affecting Boedker concerning the important criterion of diversification or ownership in any media of mass communications. No detriment will attach to her application in this respect.

70. Whatever the future structure of her application, be it sole proprietor, as now, or a corporate structure, the evidence would suggest her being awarded 100% full-time integration of ownership and management. She also would be entitled to a substantial enhancement for female ownership, moderate enhancement for local residence and moderate enhancement for past broadcast experience and civic participation. Her civic activities consist of recent membership in certain cognizable civic organization activities, and has worked full-time for radio stations in 1984 and for portions of 1979-1981.

*(Zurick)*

71. Zurick holds no mass media interests. Zurick also can be awarded 100% full-time integration credit. Zurick will be in charge of his station on a full-time basis spending a minimum of 40 hours per week in that activity; nor will he have any other employment than his full-time work as the station's general manager.

72. Zurick is entitled to a substantial enhancement for local residence. He has lived in his service area for over 60 years. Zurick's local residence is for a considerably longer period of time than Boedker's and, thus, Zurick deserves a much greater enhancement value than Boedker.

73. The evidence suggests Zurick also can be awarded a substantial enhancement for his civic activities. He has been active in local politics, a local state school for the mentally retarded, a local state college and two local development authorities. He has held leadership positions with these groups. Zurick has been active in a large number of groups and can be given a substantial enhancement because of his greater "knowledge of and interest in the community." *Policy Statement*, 1 FCC 2d at 396. Additionally, Zurick is entitled to a slight enhancement for his proposal to install auxiliary power generators.

74. Putting to the side, momentarily, Boedker's earlier disqualification principally on grounds of clear violation of Section 310(b) of the Communications Act of 1934, as amended, comparatively, too, she fares no better. Both Boedker and Zurick are equally secure on diversification grounds and both can be credited with 100% integration of ownership and management, each proposing to work at their proposed stations full-time with a minimum of 40 hours per week in the roles of principal managers. Yet, it is in the subordinate areas of comparative choice where Zurick must prevail. While Boedker is, of course, credited with female status, female status (not a cognizable minority attribute) and civic participation are less important than local residence and more important than broadcast experience. Zurick's greater preeminence in local residence and civic activities, in equal measure, outweigh Boedker's female status and her less than significant civic activities. (*Cf. Implementation of Docket 80-90, 101 FCC 2d 638, fn. 12*). Thus, long local residence in the community of license by Zurick enhanced by extensive civic activities, far outweigh Boedker's much briefer local residence, minimal civic participation, moderate broadcast experience and her female status. *See: Policy Statement on Comparative Hearings, 1 FCC* 2d 393, 396 (1965).

Accordingly, for the foregoing reasons, the application of William Phillip Zurick for the captioned facilities at Northumberland, Pennsylvania, may be AND IS HEREBY GRANTED; that being so, the application of Rebecca L. Boedker for those same facilities IS DENIED.[1]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

James F. Tierney
Acting Chief Administrative Law Judge

**FOOTNOTE**

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d) (47 CFR 1.276(d)).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-532**

In the Matter of

Amendment of Section 73.202(b), RM-7010
Table of Allotments,
FM Broadcast Stations.
(Brawley and El Centro, California)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: November 8, 1989; Released: November 28, 1989**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Brawley Broadcasting Company (petitioner), licensee of Station KWST(FM), Channel 233B, Brawley, California, seeking amendment of the FM Table of Allotments to change the community of license for Channel 233B from Brawley to El Centro, California, and modification of its license accordingly. Petitioner provided information in support of its proposal.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner advises that the requested change to El Centro is mutually exclusive with the present allotment of Channel 233B at Brawley, since it does not intend to move from its present transmitter site.[2] In this regard, petitioner states that, operating from its present site with existing facilities, Station KWST(FM) places a 70 dBu signal over the entire community of El Centro. Petitioner adds that Brawley (pop. 14,946) [3] has two FM stations and one full-time AM station whereas El Centro (pop. 23,996) has one full-time and one daytime only AM station and one FM station. Thus, petitioner's proposal would not deprive Brawley of local service.

3. A staff engineering analysis reveals that Channel 233B can be allotted to El Centro in conformity with the Commission's rules and regulations.[4] However, we are unable to conclude, based on the information submitted, that the proposed reallotment would result in a preferred arrangement of radio facilities. Petitioner, in comments, should submit information concerning the other public interest factors normally considered under our allotment priorities where no first or second aural service or first local service is at issue, such as location, city size, and the availability of reception services. Petitioner should address the question of whether, disregarding the existence of its present operations in Brawley, we would prefer a request for the allotment of Channel 233B to El Centro over a request for allotment of Channel 233B to Brawley.

4. In light of the above, we shall propose to modify Station KWST(FM), as requested, to specify El Centro as its community of license. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at El Centro.

5. In view of the fact that El Centro could receive a second local FM service, the Commission believes it would be in the public interest to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Brawley, California | 233B,241B | 241B |
| El Centro, California | 298B | 233B,298B |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 18, 1990,** and reply comments on or before **February 2, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Tillotson, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

## FOOTNOTES

[1] *See Report and Order*, MM Docket No. 88-526, 54 FR 26199, June 22, 1989; *recon. pend.*

[2] Coordinates at the licensed site of Station KWST(FM) are 32-48-27 and 115-32-18.

[3] Population figures were provided by petitioner.

[4] Coordinates used in this determination are those at the licensed site of Station KWST(FM), as indicated, *supra*.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

EMMY HAHN LIMITED PARTNERSHIP — File No. BPH-861126MS

For Construction Permit for a New FM Station on Channel 294A in Irondequoit, New York

## MEMORANDUM OPINION AND ORDER

**Adopted: October 13, 1989; Released: November 29, 1989**

By the Commission:

1. The Commission has under consideration: (1) a petition for reconsideration, filed December 22, 1987, by Emmy Hahn Limited Partnership ("Hahn"), of the *Hearing Designation Order* in MM Docket No. 87-517 (Irondequoit, New York), 2 FCC Rcd 7066 (M.M.Bur. 1987) ("Irondequoit HDO"), denying Hahn's earlier petition for reconsideration of the return of the above-captioned application, as amended; and (2) related pleadings.[1]

2. Hahn's application, filed on November 26, 1986, was returned as unacceptable for filing by staff letter on July 15, 1987 (reference 8920-RLS) because of its short-spacing to the licensed site of first adjacent channel station WPCX(FM), Auburn, New York, in violation of 47 C.F.R. § 73.207(a). On August 20, 1987, Hahn concurrently filed a petition for reconsideration requesting reinstatement of its application *nunc pro tunc* with an amendment proposing a new transmitter site. In that petition, Hahn argued that it should be permitted to amend its application by specifying a new site because the *Report and Order* in MM Docket No. 86-389, 2 FCC Rcd 3325 (M.M. Bur. May 18, 1987) ("Honeoye Falls *Order* ") allotting Channel 297A to Honeoye Falls, New York, noted that Hahn's application was short-spaced to the Honeoye Falls allotment and, therefore, should be amended to either specify a new site protecting the Honeoye Falls allotment or request a waiver of the minimum distance separation requirement. Hahn's petition did not address the previously noted short-spacing to WPCX(FM), the deficiency for which the application was returned. In the Irondequoit HDO, the Bureau ruled that Hahn could not rely upon the Honeoye Falls *Order* (adopted subsequent to the amendment as of right period in the Irondequoit proceeding) to support its request for reinstatement of its application because the limited amendment opportunity provided by the Honeoye Falls proceeding could not be extended to excuse Hahn's initial failure to propose a site in compliance with the minimum distance separation requirements of 47 C.F.R. § 73.207(a) with respect to WPCX(FM). The Bureau noted that, pursuant to the Commission's Rules, applications "patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will not be accepted for filing." 47 C.F.R. § 73.3566(a). The Bureau further noted that in adopting the "hard look" processing procedures in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (1985), the Commission stated that the resubmission of an unacceptable application with a curative amendment will not gain it *nunc pro tunc* status. *Report and Order*, *supra*, at 19,941. Accordingly, the Bureau denied Hahn's petition for reconsideration and dismissed both its amendment and its application.

3. Hahn's petition for reconsideration of the dismissal of its application in the Irondequoit HDO restates the arguments made in Hahn's initial petition for reconsideration of the return of its application. We have carefully reviewed the Bureau's disposition of the matter and find no reason to disturb that ruling. The Bureau's actions in the Honeoye Falls Rule Making proceeding do not permit correction of an unrelated acceptability defect after the amendment as of right period for curing such defects in Hahn's application had lapsed.[2] To decide otherwise would threaten the integrity of the FM processing procedures and would be unfair to those applicants in this proceeding whose applications complied fully with our acceptability requirements as of the amendment as of right date. Hahn's short-spacing to the site of licensed facility WPCX(FM) in violation of 47 C.F.R. § 73.207(a) is an acceptability defect that remained uncorrected as of the amendment as of right date, which the *Report and Order* in Docket 84-750 clearly states is the last date on which curative amendments will be accepted. [3] Since Hahn's application was clearly not acceptable for filing as of the amendment as of right date, the Bureau was correct in denying Hahn's petition for reconsideration and dismissing both its amendment and its application.

4. Accordingly, IT IS ORDERED, That pursuant to Section 1.106(j) of the Commission's Rules, Hahn's petition for reconsideration is denied. IT IS FURTHER ORDERED, That, in light of the action taken herein, the Motion for Stay IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

### FOOTNOTES

[1] These include: Hahn's December 22, 1987 Motion to Stay the Irondequoit proceeding and an Opposition to Petition for Reconsideration filed by Liberty Pole Communications Limited Partnership, an applicant in the Irondequoit proceeding.

[2] Acceptance of any amendment after the amendment as of right period "poses too great a threat to the orderly functioning" of the window and first come/first serve processing systems. *Report and Order*, *supra*, at 19,941. If accepted, untimely amendments would make it virtually impossible to process applications which may otherwise be grantable because a subsequently filed amendment to a previously unrelated application could create a conflict.

[3] The *Report and Order* in MM Docket No. 84-750 states:

> [A]pplicants will have a 30-day period [from the release of the Notice of Tenderability] to amend or perfect their applications at will and as a matter of right. . . . Amend-

ments may only go to the acceptability or grantability of an application. . . . Following the passage of the 30-day amendment period, the application and any amendments will be studied for acceptability.

. . . If the application is found to be unacceptable, it will be returned. Resubmission of such an application with a curative amendment will not gain it *nunc pro tunc* status since applicants were afforded 30 days after the release of the *Notice of Tenderability* to amend their applications into acceptable form. To permit curative amendments after that period poses too great a threat to the orderly functioning of our new processing procedures.

*Report and Order, supra,* at 19,941.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Tel-Central of
Jefferson City,
Missouri, Inc.
Complainant,

v. File No. E-87-59

United Telephone Company of
Missouri, Inc.
Defendant.

## MEMORANDUM OPINION AND ORDER

**Adopted: November 17, 1989; Released: November 29, 1989**

By the Commission:

## I. INTRODUCTION

1. We have before us a Complaint filed by Tel-Central of Jefferson City, Missouri, Inc. ("Tel-Central") against United Telephone Company of Missouri, Inc. ("United"), seeking damages resulting from the disconnection of service on approximately 91 WATS lines for the alleged non-payment of disputed charges, claimed to be in violation of Sections 201(b), 202(a), and 203(c) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a), and 203(c).[1] United's Answer denied the alleged violations, and counterclaimed that Tel-Central owed it $90,889.32 for WATS services.[2] Also pending is United's cross-complaint alleging non-payment by Tel-Central of $321.668 for the provision of Feature Group A (FGA) access service to Tel-Central pursuant to tariff from May 1984 through September 1985. [3] In its answer to the cross-complaint, Tel-Central denied that it owed United $321.668 for FGA services for that period[4] and raised a statute of limitations defense, relying on § 415(a) and (e) of the Act.

2. Tel-Central's Second Amended Complaint Seeking Damages detailed the damages allegedly suffered as a result of the WATS lines disconnection, totalling $38,354,848.97. These damages were alleged to have occurred because one of the disconnected WATS lines was an incoming administrative line which Tel-Central was using during an equal access balloting period to inform customers about Tel-Central's presence on an equal access ballot and accordingly, Tel-Central alleges that it was damaged by the loss of unspecified numbers of customers whose access to equal access ballot information was impaired. Other damages are alleged to have resulted from customer dissatisfaction resulting from the service interruption. Tel-Central states that the service disconnection of its 91 WATS lines was especially ruinous to its relations with its customers, who had spent large though unspecified sums advertising their 800 numbers that were provided by Tel-Central, with a deleterious impact on Tel-Central's revenues.[5] Exhibit 1 of the Second Amended Complaint is a Damage Study, which purports to identify present and future damages sustained by Tel-Central as a result of its temporary loss of WATS service due to the service disconnection resulting from the instant billing dispute.

## II. THE COMPLAINT

### A. Background.

3. Tel-Central, located in Jefferson City, Missouri, is a reseller of intrastate and interstate telecommunications services.[6] As relevant herein, Tel-Central received certain interstate and intrastate interLATA WATS services of AT&T furnished through, and billed by, United under a joint service agreement between AT&T and United, as well as intrastate intraLATA WATS services provided by other phone companies or jointly by United and other phone companies.[7] Tel-Central resold these services, including interstate WATS services furnished by United under the joint arrangement with AT&T.[8]

4. By correspondence dated March 17, 1986, United advised Tel-Central that it had been unable to accurately and timely bill Tel-Central for prior WATS services, because of problems experienced in obtaining Tel-Central's usage information from certain unspecified companies other than Tel-Central.[9] According to the March 17, 1986 letter, a "Special Bill" was attached to cover the adjusted billing for the prior period.[10] Subsequently, on August 20, 1986, additional special bills were sent by United to Tel-Central seeking additional sums for the same prior period.[11] Together these special bills sought retroactively to charge Tel-Central $120,771.86 for past usage periods, including the period from June 1984 through February 1986.[12]

5. Through an exchange of correspondence, Tel-Central vigorously disputed the retroactive charges. On April 1, 1987, by written correspondence to United, Tel-Central stated its belief that it had already paid $90,889.32 of the $120,771.86 claimed to be outstanding.[13] Tel-Central agreed that it owed $29,882.54 for certain WATS service and was prepared to pay that amount, in full satisfaction of the dispute. United has consistently maintained that the entire amount of $120,771.86 was due, and refused to accept any partial payment offered by Tel-Central.[14] By letter dated March 27, 1987, United informed Tel-Central that if payment in the amount of $120,771.86 was not received within five days of receipt of the letter, WATS service would be suspended.[15] In response, Tel-Central tendered a check in the amount of $29,882.54 that contained a restrictive endorsement which United purports meant that its acceptance would constitute "full satisfaction" of the $120,771.86 back-billing.[16] United rejected this check and on April 7, 1987 informed Tel-Central that suspension of WATS service would begin that day at 5:00 p.m.[17] At no time did Tel-Central submit or tender payment in the full amount of $120,771.86 claimed for the intrastate and interstate WATS services provided, either within the five day period specified in the March 27 letter, or when United returned Tel-Central's restrictively endorsed check. Accordingly, on April 7, 1987, United terminated Tel-Central's service on approximately 91 WATS lines.

6. Tel-Central filed the instant complaint with the Commission on May 14, 1987 and concurrently filed a request for extraordinary relief, seeking an order requiring United to restore service on the 91 WATS lines. After discussions among the parties and Enforcement Division staff, Tel-Central paid United $29,882.54 on account and furnished a letter of credit in the amount of $90,195.32.[18] United restored service to Tel-Central on the disconnected lines on June 19, 1987.[19]

**B. Contentions of the Parties.**

7. Tel-Central claims that the service disconnection was unjust, unlawful, and discriminatory in that: a) of the $120,771.86 retroactively billed by United, $90,889.32 had been paid, and Tel-Central had tendered the balance of $29,882.54 prior to disconnection, in response to United's 5-day notice; b) the disconnection, after five days notice, was not in accordance with the applicable tariff, United's Tariff FCC No. 5, which required a 30-day written notice prior to disconnection for non-payment of charges;[20] and c) even if AT&T's Tariff FCC No. 2 was the applicable tariff, rather than United's Tariff FCC No. 5, as urged by United, the disconnection was unlawful because United disconnected all 91 of Tel-Central's intrastate and interstate WATS lines, when the disputed charges pertained to only 15 of those 91 lines. Moreover, in this regard, Tel-Central argues that if United should claim that AT&T was responsible for disconnection of its WATS lines, the disconnection would still be unlawful under AT&T's Tariff FCC No. 2, since there is no evidence that United was acting properly as an agent under AT&T's authority in effecting the service disconnection.[21] Even assuming that United was acting pursuant to AT&T's authority, Tel-Central asserts that AT&T's Tariff FCC No. 2 contains no express provision that sanctions the termination of all services when some of those services were paid and in good standing.[22] Tel-Central argues that at worst, AT&T's tariff is ambiguous on the scope of a permissible service disconnection, and that under these circumstances and Commission precedent, that tariff should be construed most narrowly against United, in order to afford Tel-Central the relief and damages it requested.[23]

8. United admits that by correspondence dated March 17, 1986, it advised Tel-Central that due to a delay in obtaining a portion of Tel-Central's usage information from other carriers, it would be sending Tel-Central statements for services furnished, but previously unbilled.[24] United contends that these statements and subsequent back-bills sought to recover for charges properly due for the period from June 1984 through February 1986 for WATS services used by Tel-Central. United contends that Tel-Central improperly sought to condition its payment of an undisputed $29,882.54 portion of the $120,771.86 on United's relinquishment of its claim for the remaining $90,889.32, by tendering the restrictively endorsed check in the amount of $29,882.54 on April 7, 1987. United contends that it properly rejected the tender of this partial payment, out of fear that acceptance would bar any subsequent attempt to collect the full amount.[25] United states that it advised Tel-Central in its letter dated March 27, 1987 that if payment in the amount of $120,771.86 were not received within five days, Tel-Central's "WATS services" would be suspended.[26] United rejects Tel-Central's attempt to characterize the situation as a "billing dispute" involving only fourteen out-going, and one incoming WATS line.[27] Rather, in its view there was a failure to pay for WATS *service* obtained under tariff (as opposed, by implication, to specific WATS *lines* furnished pursuant to tariff).[28] United argues that Tel-Central's reference to a 30-day prior notice period as a pre-condition to disconnection of its WATS service invokes the wrong tariff. United noted that the 30-day notice provision relied on by Tel-Central is found in United's Tariff FCC No. 5, which covers the provision of interstate access service, and termination thereof, and does not apply to the provision or termination of WATS services.[29] According to United, the applicable tariff was AT&T's Tariff FCC No. 2, and the applicable provision thereof required only five days prior written notice as a pre-condition to service disconnection for non-payment, a condition it fulfilled. United states that it gave Tel-Central proper and timely notice of the service disconnection, and denies that the provisions of United's interstate access tariff are relevant to the instant controversy.

**C. Discussion.**

9. We have reviewed the evidentiary record in this proceeding, as well as the voluminous briefs, and conclude that the record does not support Tel-Central's contentions. Since the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties,[30] the pivotal issue is that of the governing tariff. Tel-Central argues in its Brief that the only tariff that United has on file is its Tariff F.C.C. No. 5. Tel-Central states that a letter from United dated October 6, 1986 "relative to Feature Group A (FGA) services only references this tariff".[31]

10. The letter cited by Tel-Central erroneously states that charges were due with respect to FGA services and refers to United's interstate access tariff.[32] Although the letter compounds a complicated situation, we assign it little weight in light of notice given otherwise to Tel-Central regarding the amount claimed due for WATS service.[33] The facts show that the service suspended was not FGA exchange access service, but rather interstate WATS service. Tel-Central does not dispute that the service at issue is WATS and not FGA. Interstate WATS service was not a United service, and was not tariffed by United. Rather, it was an AT&T interstate service offering furnished through, and billed by, United under a joint agreement with AT&T.

11. The record shows that the AT&T WATS services were ordered, furnished, and priced pursuant to the terms and conditions of AT&T's interstate WATS tariff, AT&T Tariff FCC No. 2, and not those of United's interstate access tariff, as Tel-Central contends. Tel-Central has presented no facts or substantial argument to rebut this conclusion. We note that such a situation is foreseen in AT&T's FCC Tariff No. 2, since it defines the term "the Company", as used throughout that tariff, as including not only AT&T Communications (AT&T), but also "its concurring carriers, connecting carriers, and its other participating carriers, either individually or collectively."[34] We note more specifically that United as well as all other local exchange carriers are "other participating carriers" under AT&T's FCC Tariff No. 2. By virtue of their definitional inclusion in the term "the Company," these carriers are governed by, and authorized to invoke all terms and provisions of that tariff when they are involved in the provision of the tariffed services. Accordingly, termination for non-payment of service would be governed by applicable provisions, if any, of that tariff, whether the

termination was carried out by AT&T or United.[35] AT&T's WATS tariff provides: "[t]he Company may disconnect existing service and/or deny requests for additional WATS for nonpayment of charges due as specified in Section 2.5.3. (Payment of Charges) preceding. A written notice will be sent to the customer at least five days in advance of the disconnection of service and/or denial of additional WATS".[36] Section 2.5.3. provides that "[p]ayment is due upon presentation of a bill for the service furnished. WATS may be disconnected for nonpayment of a bill . . . ". Thus, United was correct in applying the 5-day minimum notice provision of the AT&T tariff to this service disconnection, rather than the 30-day provision required in the United tariff. The service disconnection was not unlawful, therefore, for lack of sufficient prior written notice.

12. Notwithstanding the fact that United properly applied the applicable tariff, Tel-Central takes the position that the disconnection could still be found unlawful under the Act, if the charges billed were in fact not due. While Tel-Central alleges that $90,889.32 of the $120,771.86 billed is not in fact due, the burden of proving prior payment of the charges concerned, and thus any consequent wrongful "double billing" and consequential damages, rests with the complainant. The record contains no support for the position that Tel-Central previously paid any of the bill adjustments which constituted the subsequently billed charges. The gist of Tel-Central's argument seems to be, on thorough examination of the record, that it had previously paid the underlying bills to which the special bills referred. The record does not, however, reflect that it had paid any amounts corresponding to the retroactive adjustments for which the special bills sought payment. Thus, the fact that Tel-Central furnished for the record copies of the special bills which contained notations and dates, presumably of prior payments, is unpersuasive that the claimed retroactive adjustments are in error.[37] Absent evidence of payment, the factual predicate underlying Tel-Central's proposed conclusion of law is without basis.

13. We must next determine whether United unlawfully terminated all of Tel-Central's 91 WATS lines when charges were allegedly due and unpaid on only 15 of these lines. As noted above, Section 2.5.3 authorizes the disconnection of service for non-payment of charges and the procedures governing disconnection are covered by Sections 2.5.3 and 2.8.3. of AT&T Tariff F.C.C. No. 2. These provisions fail to support Tel-Central's contention that United is restricted in the number of furnished WATS lines it may disconnect or on which it may suspend service in the event of an alleged failure to pay charges billed for certain WATS lines. Section 2.5.3. states that "WATS may be discontinued for non-payment of a bill", and Section 2.8.3. states not only that existing service may be disconnected, but also that requests for additional service may be denied for non-payment of existing service. Tel-Central is correct in arguing that in cases of a tariff ambiguity the terms are intrepreted in favor of the customer. We do not find here, however, the disputed tariff terms ambiguous, and have no basis to construe them adversely to United. These provisions clearly encompass WATS service as a whole and we can find no acceptable way to interpret the tariff as requiring disconnection of only specific WATS lines.

14. In support of its case, Tel-Central relies on an affidavit of an AT&T official furnished by United with its Brief.[38] The AT&T affidavit states: "As section 2.8.3. of the Tariff permits, AT&T's practice is to disconnect all of a customer's Tariff 2 services for failure to pay *any undisputed* charges owing for any Tariff 2 service" (emphasis supplied).[39] Tel-Central's interpretation appears to be that it is AT&T's practice to terminate all WATS service only when *undisputed* charges remain unpaid, but that when *disputed* charges are involved, the rights of AT&T (and other carriers subject to the tariff) are limited to disconnection of only those lines for which the charges are in dispute. Tel-Central's reliance on this affidavit for this premise is misplaced for two reasons. First, the affidavit by its terms only refers to situations involving unpaid, *undisputed* charges. It does not purport to describe what the AT&T practice is in the case of *disputed* charges such as those which are the subject of the instant complaint. Second, and more importantly, Tel-Central's interpretation of the import of the affidavit is not reflected in any applicable tariff provision. Section 2.8.3. of AT&T Tariff F.C.C. No. 2 governs the procedure for this disconnection, and there is nothing in that section that limits disconnection of all WATS service to situations involving only *undisputed* unpaid charges. It is established law that the terms of the applicable tariff determine the rights of the parties, and cannot be varied by inconsistent, non-tariff representations.[40] Because the disconnection was effected in a manner plainly consistent with an ordinary, fair reading of Section 2.8.3., the disconnection of all WATS service of Tel-Central in these circumstances was lawful. The fact that more than one interpretation of the affidavit could conceivably be made does not change the parties' legal rights and obligations under the plain language of the tariff.

15. As to Tel-Central's allegations of discriminatory treatment by United, we fail to find any facts in the record to support such a contention. Tel-Central apparently bases its theory of unlawful discrimination on the statements as to AT&T's alleged internal policy made by the AT&T employee in the affidavit discussed above. Such an assertion is without basis, and we conclude that no evidence of an actual discrimination has been presented in this Complaint. A mere possibility of discriminatory treatment, as Tel-Central may be suggesting here, is insufficient to support a *prima facie* case. Absent facts showing an actual discrimination or preference, complainant can rely only on those facts of record, if any, which show that it was treated at variance with the express language of the applicable tariff. Here, complainant has failed to adduce any such facts. Because we find that United acted properly under the appropriate tariff, we deny its claim for damages allegedly suffered as a result of the disconnection of WATS service.

16. Finally, United's Answer to the Complaint contains a request for relief which seeks a Commission order requiring Tel-Central to pay the remaining $90,889.32 of back-billed WATS charges in dispute. We decline to order the requested relief for the reasons set forth in *Illinois Bell Telephone Co. et al. v. AT & T et al.*, 4 FCC Rcd 5268, 5270 (1989), *recon. denied* FCC 89-287 (released Oct. 20, 1989). The complaint procedures make a carrier liable to a customer for damages that result from the carrier's unlawful actions or omissions. 47 U.S.C. §§ 206-209. However, this statutory scheme does not constitute the Commission as collection agent for carriers with respect

to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment, or a termination or disconnection of service until those charges have been paid. Accordingly, we decline to order this part of the relief requested in United's Answer.

## III. THE CROSS-COMPLAINT

### A. Background.

17. According to United, it provided Tel-Central with foreign exchange (FX) service in a number of Missouri exchanges until May, 1984. Effective May 25, 1984, as a result of access tariff revisions filed with the Commission, this FX service was reclassified as Feature Group A service. From that day forward, United contends, Tel-Central "should have been" billed for FGA service. It appears that United was unable to implement the changes from FX to FGA, for billing purposes, until October 1985. As a result, according to United, United's representatives met with Tel-Central representatives on June 6, 1985 to discuss the billing situation. Tel-Central was advised that retroactive bills would be sent, covering the reclassified FGA service.[41] It appears that the first notice that Tel-Central received regarding the reclassification of its FX service to FGA service was at the June 6, 1985 discussion, over one year after the change in service. United does not appear to have formally billed Tel-Central, as of the date of the Cross-Complaint, for the $321.668 for the FGA service provided pursuant to tariff from May 1984 through September 1985, until it sent a so-called "Retro FGA" bill dated September 2, 1987. United now claims that this amount remains unpaid.

18. According to Tel-Central, the meeting described by United was held in June 1985, but its purpose was to discuss service problems, and not "to discuss the retroactive billings Tel-Central would be receiving for FGA service," as alleged by United.[42] Tel-Central states that United did inform Tel-Central "that it would begin to provide Tel-Central with FGA service when it had the ability to bill for that service". Tel-Central maintains United did not indicate that any rate increase would result from the reclassification and did not inform Tel-Central of the "content of the tariff publication," nor did it inform Tel-Central that Tel-Central would be retroactively billed.[43]

### B. Contentions of the Parties.

19. United contends that Tel-Central was given proper notice of the tariff change resulting from the reclassification of FX to FGA service, by virtue of oral discussions of that prospective tariff change, which took place in a meeting held with Tel-Central on June 6, 1985, and therefore that the retroactive bills regarding this reclassified service are proper, and thus remain due, and unpaid.[44]

20. Tel-Central takes issue with the propriety of the FGA retroactive billing, claiming that sufficient notice of the tariff change was not given as required by Section 61.58 (a) (4) of the Commission's Rules,[45] and that United did not inform Tel-Central that it would be retroactively billed.[46] According to Tel-Central's arguments, this purported lack of proper notice voids United's attempts to bill and collect for the retroactive FGA charges at issue. Tel-Central further takes the position that all but three month's worth of the FGA charges are barred by the statute of limitations, 47 U.S.C. § 415.[47]

### C. Discussion and Conclusion.

21. The cross-complaint involves an allegation of nonpayment of an interexchange carrier's charges brought against a resale carrier customer. For the reasons discussed, *supra* at paragraph 16, we dismiss the cross complaint.

## IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to authority granted in sections 201(b), 47 U.S.C. § 201(b); 4(i), 47 U.S.C. § 154(i); 5(c)(1), 47 U.S.C. § 155(c)(1) of the Communications Act, and delegated in section 0.291 of our Rules, 47 C.F.R. §§ 0.291, that Tel-Central's complaint IS DENIED.

23. IT IS FURTHER ORDERED, pursuant to section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and section 1.728 of our Rules, 47 C.F.R. § 1.728, that United's cross-complaint IS DISMISSED for failure to state a cause of action on which relief can be granted.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] The pleadings before us consist of the Complaint and a Request for Extraordinary Relief, both filed May 14, 1987; an Amended Complaint, Addendum to Complaint and Erratum, filed June 15, 1987; an Answer, filed July 2, 1987; Tel-Central's Reply, timely filed July 21, 1987; a Cross-Complaint, filed July 2, 1987; an Answer to Cross-Complaint and a Motion to Dismiss Cross-Complaint, both filed August 7, 1987; a Motion for Extension of Time to File Reply to Cross-Defendant's Answer to Cross-Complaint and Motion to Dismiss filed August 19, 1987; a Reply to Answer to Cross-Complaint and Motion to Dismiss filed September 4, 1987; a Second Amended Complaint, filed January 29, 1988; a Supplement to Second Amended Complaint, filed March 30, 1988; Tel-Central's Brief, filed May 6, 1988; United's Brief, filed May 27, 1988; an Erratum to Tel-Central's Brief, filed May 9, 1988; and Tel-Central's Reply Brief, filed June 9, 1988.

[2] Answer at 10. Wide Area Telecommunications Service (WATS) is an outbound, direct-dial telephone calling service for calls placed nationwide or to pre-specified geographical areas. WATS is typically ordered by end user customers and non-facilities-based resale carriers. As provided under AT&T Tariff FCC No. 2, WATS is provided on an interstate basis and is charged for on an hourly, rather than per-call, basis.

[3] Feature Group A (FGA) is an interstate telecommunications access arrangement provided by local exchange carriers, typically to interexchange carriers, which provides line-side local switching connections to enable the origination and termination of interstate calls to or from points within local exchange areas.

[4] Tel-Central Answer to Cross-Complaint at 4.

[5] Complaint at 5.

[6] *Id.* at 2.

[7] Answer at 6.

[8] Complaint at 2; Answer at 3, 4, 6.

[9] Complaint at 3.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Complaint at 3, 4.

[15] Answer at 4, Attachment B.

[16] United Brief at 3, 4.

[17] Complaint at 4.

[18] Answer at 8.

[19] *Id.*

[20] Complaint at 6.

[21] Complaint at 7.

[22] *Id.*, citing AT&T Tariff FCC No. 2, Section 2.8.3. *Nonpayment of Charges*, and Section 2.5.3. *Payment of Charges*. These provisions state:

> 2.5 PAYMENT AND CHARGES
>
> . . . .
>
> 2.5.3. Payment of Charges - Payment is due on presentation of a bill for the service furnished. WATS may be discontinued for nonpayment of a bill (see Violation of Regulations, page 44).
>
> . . . .
>
> 2.8.3. Nonpayment of Charges - The Company may disconnect existing service and/or deny requests for additional WATS for nonpayment of charges due as specified in Section 2.5.3. (Payment of Charges) preceding. A written notice will be sent to the Customer at least five days in advance of the disconnection of service and/or denial of additional WATS. Upon payment of charges the denial of additional WATS will be removed.

[23] *See*, Complaint at 11, and cases cited.

[24] Answer at 3.

[25] Answer at 4.

[26] *Id.*

[27] Although Tel-Central refers to this in-bound service as "WATS," and it is offered pursuant to AT&T's Tariff FCC No. 2, it is technically known as "800-Service."

[28] Answer at 5.

[29] *Id.*

[30] *See e.g.* Mocatta Metals Corp., 54 F.C.C. 2d 104 (1976)

[31] Tel-Central Brief at 7.

[32] *See* Complaint, Attachment 5, letter dated October 6, 1986 from United Telephone System to Tel-Central of Jefferson City, Missouri, Inc., which states:

> To confirm our conversation of September 25, 1986, and our letter dated September 30, 1986, please be advised unless full payment of $123,957.19 is received within 30 days of receipt of this written notice by Certified Mail, your FGA lines will be suspended. Company policy for the disconnection of lines due to non-payment is outlined in the FCC Interstate Tariff, Section 2, Part 29, paragraph 1.8.

The record does not reveal why the amount demanded in this letter is inconsistent with the amount claimed to have been retroactively billed.

[33] *See supra* paras. 4-5.

[34] AT&T Tariff F.C.C. No. 2 § 2.9.

[35] United Brief at 6.

[36] AT&T Tariff F.C.C. No. 2 § 2.8.3.

[37] *See*, Complaint, Attachment 1 (at various unnumbered pages).

[38] United Brief, Exhibit C (Unger Affidavit).

[39] United Brief, Exhibit C, at 2 (Unger Affidavit).

[40] *M. R. C. S., Inc. v. MCI Communications Corp.*, Cir. A. No. 86-3831 (E.D. La. 1987). *AT & T v. Florida - Texas Freight, Inc.*, 375 F. Supp. 977 (S.D. Fla. 1973), aff'd, 485 F.2d 1390 (5th Cir. 1973). *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986). *Mocatta Metals Corp.* 54 F.C.C. 2d 104 (1976). *See* generally, *Keogh v. Chicago N.W. Railway Co.*, 260 U.S. 156, 43 S. Ct. 47 (1922); *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588 (5th Cir. 1978).

[41] Cross-Complaint at 2.

[42] Answer to Cross-Complaint at 3.

[43] *Id.*

[44] Cross Complaint at 2.

[45] 47 C.F.R. § 61.58(a)(4) states:

> This subsection applies only to dominant carriers. If the tariff publication would increase any rate or charge, or would effectuate and [sic] authorized discontinuance, reduction or other impairment of service to any customer, the offering carrier must inform the affected customers of the content of the tariff publication. *Such notification should be made in a form appropriate to the circumstance*, and may include written notification, personal contact, or advertising in newspapers of general circulation. (emphasis supplied)

Thus, it was permissible for United to give Tel-Central only oral notice, as the record indicates occurred.

[46] Answer to Cross-Complaint at 3.

[47] Motion to Dismiss at 1.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 20, 1989**

**Released: November 29, 1989**

8920-NPB

Group W Radio Acquisition Company
c/o Ramsey L. Woodworth, Esq.
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W.
Washington, D.C. 20006-2866

Sillerman-Magee Communications
Management Corporation
c/o Martin Leader, Esq.
Fisher Wayland Cooper & Leader
1255 23rd St., N.W.
Suite 800
Washington, D.C. 20037

In re: WMMR(FM)
Philadelphia, PA
BTCH-890726GU

Gentlemen:

This is in reference to the above-captioned application for the transfer of control of WMMR(FM), Philadelphia, PA, from Sillerman-Magee Communications Management Corporation to Group W Radio Acquisition Company ("Group W Acquisition"); and Group W Acquisition's related request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(b).

Group W Acquisition is a subsidiary of Westinghouse Broadcasting Company, Inc. ("Westinghouse"). Westinghouse currently owns and operates KYW-TV, Philadelphia, PA, through its subsidiary, Group W Television, Inc. Westinghouse also owns and operates KYW(AM), Philadelphia, PA through Group W Acquisition, which wholly owns the station's licensee, Group W Radio, Inc. A grant of the above-captioned application would thus result in the common ownership of a television station, an FM radio station and an AM radio station in the same market in violation of Section 73.3555(b) of the Commission's Rules. However, the Commission recently amended Section 73.3555(b) to permit waiver under certain conditions. *Amendment of Section 73. 3555 of the Commission's Rules, Second Report and Order*, 4 FCC Rcd 1741 (" *Second Report* "), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989). Specifically, the Commission stated that it would look favorably upon waiver requests involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees after the proposed merger, as determined by counting full-service television licensees in the relevant ADI television market and radio licensees in the relevant television metropolitan market ("top 25 markets/30 voices standard"). *Second Report* at 1751.[1] Subsequently, the Commission granted two such waivers. *See Capital Cities / ABC, Inc.*, 4 FCC Rcd 5498 (1989) (AM-FM-TV); *WHD - AM, Inc.*, 4 FCC Rcd 5795 (1989) (AM-TV). The Commission also stated that it would not scrutinize these applications for economic efficiencies because it had already determined that such efficiencies generally exist. *Second Report* at 1751. Further, the Commission concluded that the benefits of permitting radio-television combinations in the top 25 markets having many competing voices generally would not undermine the benefits flowing from the Commission's traditional policies favoring competition and diversity. *Id.*

Group W Acquisition contends that its waiver request meets this standard. In support of its request, Group W Acquisition states that the Philadelphia television market is ranked fourth in the country.[2] Group W Acquisition also submitted a tabulation of the separate broadcast owners in each market, which it states was prepared in accordance with the standards prescribed by the Commission, which shows that, excluding the current licensee of WMMR(FM), there are currently 56 separate voices in Philadelphia. Group W Acquisition also states that, in addition to meeting the Commission's benchmark, this waiver and resulting combination would benefit the public interest by making available to WMMR(FM) the considerable news gathering resources of both KYW-TV and KYW(AM), which will be used in the news and informational programming broadcast by WMMR(FM); by resulting in cost efficiencies which can lead to programming and other benefits; by providing the opportunity for joint promotional efforts which may enhance the impact of local public service campaigns; and by making available the KYW(AM) production facilities to community groups for production of public service announcements for airing on WMMR(FM). Group W Acquisition contends that, in view of these facts, a grant of the requested waiver is warranted, and is completely consistent with the Commission's recent grant in *Capital Cities / ABC, Inc., supra.*

We have reviewed the information submitted by Group W Acquisition and find that it clearly meets the top 25 markets/30 voices standard adopted by the Commission. Accordingly, we hereby grant Group W Acquisition's request for a permanent waiver of the Commission's one-to-a-market rule, Section 73.3555(b), to permit it to acquire ownership of WMMR(FM), Philadelphia, PA, while allowing Group W to retain ownership of KYW-TV, Philadelphia, PA. Additionally, upon a finding that the applicant is qualified and the public interest will be served, we hereby grant the application to transfer control of WMMR(FM), Philadelphia, PA, to Group W Acquisition (BTCH-890726GU).

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] The Commission also stated that it would look with similar favor on waiver requests involving failed broadcast stations. *Id.* at 1752. Beyond these two circumstances, the Commission asserted that waiver applications would be considered on a case-by-case basis and evaluated using a number of public interest criteria. *Id.* at 1753. *See Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347 (1989) (AM-FM-TV).

[2] While the ranking Group W Acquisition states for Philadelphia is correct according to the most recent available *Arbitron Ratings Television ADI Market Guide (Arbitron Guide)*, Group W Acquisition cites a different source. The *Arbitron Guide* is the source of market ranking information under our Rules.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

IT&E OVERSEAS, INC. File No. I-T-C-89-158

Application for authority to acquire and operate cable facilities for service between Guam, on the one hand, and the U.S. mainland, Hawaii, Japan, Taiwan and the Philippines, on the other hand and beyond.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: November 21, 1989; Released: November 29, 1989**

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 28, 1989, by IT&E Overseas, Inc. (IT&E), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate cable facilities for direct service between Guam, on the one hand, and the U.S. mainland, Hawaii, Japan, the Philippines and Taiwan, on the other hand, and beyond. The application was placed on public notice on September 13, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Guam and the U.S. mainland, Hawaii, Japan, the Philippines and Taiwan by IT&E.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-158 IS GRANTED and IT&E is authorized to:

a. acquire from AT&T, Worldcom (formerly ITT Worldcom), KDD (correspondent in Japan) and PLDT (correspondent in the Philippines) by lease, IRU or ownership MAUOs in various submarine cables as set forth in the attached appendix; and

b. use said facilities to provide international message telephone service, data, facsimile and private line services between Guam, on the one hand, and the U.S. mainland, Hawaii, Japan, the Philippines and Taiwan, on the other hand, and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between IT&E and its correspondents in Japan, the Philippines and Taiwan, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of lease, IRU or ownership agreements between IT&E and AT&T and Worldcom, and between IT&E and its correspondents in Japan and the Philippine, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the semi-annual reports required by Section 63.10 of the Commission's Rules and Regulations, 47 C.F.R. §63.10 (October 1, 1988).

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

## APPENDIX

| Destination | Cable | No. of MAUOs | Acquired from | Interest |
|---|---|---|---|---|
| US - Hawaii | TPC3/HAW-4 (Guam-Hawaii-US) | 60 (1/2 interests) | PLDT | Lease |
| US - Hawaii | TPC3/HAW-4 (Guam-Hawaii-US) | 30 (whole interests) | WorldCom | Lease |
| US - Hawaii | TPC4 (US-Japan) | 60 (1/2 interests) | AT&T | Ownership |
| Japan | TPC3 (Guam-Japan) | 30 (1/2 interests) | AT&T | IRU |
| Japan | TPC3 (Guam-Japan) | 60 (1/2 interests) | AT&T | IRU/Lease |
| Philippines | GPT (Guam-Philippines) | 60 (1/2 interests) | AT&T/PLDT | Ownership |
| Taiwan | GPT (Guam-Taiwan) | 30 (1/2 interests) | AT&T | IRU |

Note: The IT&E request to acquire capacities in HAW-5 and KYUTAI Cables is dismissed without prejudice, since HAW-5 and KYUTAI are not described in the application or a matter of record before the Commission.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-84**

In re Applications of

POSEY COUNTY BROADCASTING CORP. File No. BPH-861023MD

SOUTHERN INDIANA BROADCASTING File No. BPH-861126MP

For Construction Permit for a
New FM Station on Channel 294A
in Mount Vernon, Indiana

**Appearances**

*John M. Shoreman*, on behalf of Southern Indiana Broadcasting, Ltd.; and *Harry C. Martin* and *Cheryl A. Kenny*, on behalf of Posey County Broadcasting Corp.

**DECISION**

**Adopted: November 17, 1989; Released: December 1, 1989**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. This proceeding involves the applications of Posey County Broadcasting Corp. (Posey) and Southern Indiana Broadcasting (Southern) for authority to construct a new FM broadcast station in Mount Vernon, Indiana. In an *Initial Decision* (I.D.), FCC 89D-12, released April 17, 1989, Administrative Law Judge John M. Frysiak (ALJ) granted Posey's application under the standard comparative issue, which was the only issue tried. The ALJ concluded that Posey was clearly preferred on the basis of its superior quantitative integration. The case is now before the Review Board on exceptions by Southern and limited exceptions by Posey. Based on our review of the exceptions and reply briefs, the oral argument heard September 15, 1989, and the hearing record, we affirm the I.D.'s grant of Posey's application.

**COMPARATIVE ISSUE**

2. The ALJ awarded Posey 100% integration credit based on its proposal to integrate full-time its two corporate owners, Ann M. Nussel, 51% stockholder, and her husband, Bill A. Nussel, 49% stockholder. On the other hand, although Southern, a limited partnership, sought 100% integration credit based on the proposed integration of Phyllis Johnson, its sole general partner, the ALJ reduced its credit to 15%, which is equal to Ms. Johnson's equity interest, because of the active role played by its sole limited partner, McFadden Communications Corporation, which holds an 85% equity interest. Based on this difference in quantitative integration credit alone, the ALJ found Posey to be the comparative winner. I.D., paras. 42, 47, 49, 51. In reaching this conclusion, the ALJ also determined that Posey, the licensee of AM daytime station WPCO, in Mount Vernon, was entitled to a daytimer preference in accordance with the Commission's *Second Report and Order, FM Broadcast Assignments*, 101 FCC 2d 638 (1985), *recon. denied*, 59 RR 2d 1221 (1986), *further recon. denied*, 2 FCC Rcd 481 (1987), *aff'd sub nom. National Black Media Coalition v. FCC*, 822 F.2d 277 (2nd Cir. 1988). I.D., paras. 39-40. While the award of this daytimer preference to Posey strictly resulted only in upgrading the value of its past broadcast experience, I.D. at para. 41; *FM Broadcast Assignments*, 59 RR 2d at 1222 (1986), Southern attacks this result on broader grounds, arguing that if Posey is not awarded a daytimer preference, it must bear the diversification impact of its AM station ownership, which would significantly affect the overall comparison between the applicants.

3. Specifically, Southern contends that Posey has failed to meet one of the requirements for the award of a daytimer preference, *i. e.*, it did not establish that its owners, Ann and Bill Nussel, spent more than twenty hours per week, either individually or jointly, participating in the management of WPCO during the three year period prior to filing the FM application. [1] In Southern's view, the record evidence does not support the ALJ's conclusion that the Nussels were sufficiently involved in supervisory activities to meet the Commission's test. Southern argues that Mrs. Nussel, the purported general manager of WPCO since 1983, has had no managerial role at the station, and Mr. Nussel's participation has been limited strictly to technical and ministerial matters. Southern further maintains that it is Richard Grogg, WPCO's station manager, who has functioned as general manager of the station since his hiring in 1983. Grogg's responsibilities at WPCO are all-encompassing, according to Southern, and in evident derogation of the roles the Nussels claim to have played. In this regard, Southern claims that at the hearing it sought to introduce the deposition of Mr. Grogg in an attempt to show that all managerial responsibilities at WPCO had been delegated to him, but that this effort was rebuffed by the ALJ in violation of the discovery procedures set forth in 47 C.F.R. 1. 321(d)(2). [2] Southern states that it would have used the deposition of Mr. Grogg, whom neither party called as a witness, to impeach the testimony of Posey's owners, particularly Mrs. Nussel, regarding their station activities. Southern concludes that since Posey does not meet the criteria for a daytimer preference, and has not otherwise timely committed to divest its AM station, it must be assessed a substantial diversification demerit, citing *Martin Intermart, Inc.*, 3 FCC Rcd 1650 (Rev. Bd. 1988), *rev. dismissed* (settlement), FCC 881-059, released June 20, 1988.

4. We reject Southern's exceptions and find that Posey is fully entitled to a daytimer preference which, in consequence, eliminates any diversification demerit for its ownership of WPCO. [3] There is no serious dispute that Posey readily qualifies under four of the five Commission criteria for daytimer credit; that is, the FM channel at issue is in the same community to which WPCO is licensed; Posey has operated WPCO since July 1983, which is more that three years prior to the filing of its FM application on October 23, 1986; on April 6, 1988, which

was within thirty days after designation of its application for hearing, Posey pledged to divest WPCO within three years of commencement of FM operations; and both Mr. and Mrs. Nussel propose to be integrated into operation of the FM station. I.D., para. 39; *Second Report and Order, FM Broadcast Assignments, supra*, 101 FCC 2d at 645-647. Southern's only real challenge is to whether the Nussels devoted the required twenty hours per week to WPCO's operation and to the ALJ's ruling excluding use of Mr. Grogg's deposition testimony on this point. We turn to the latter point first.

5. The dispute pertaining to Mr. Grogg arose after the ALJ ruled that he would not require Posey to produce Grogg as a witness for cross-examination--Posey had objected on the grounds that Grogg was not a principal nor a sponsor of any exhibit--and that Southern was free to subpoena Grogg as its own witness. *Order*, FCC 88M-3249, released October 3, 1988. Southern declined to call Grogg as its witness but instead sought to introduce his deposition testimony into evidence, to which Posey objected because Grogg would not be available for cross-examination. The ALJ sustained Posey's objection. Tr. 64-70. Southern now argues that the deposition of Grogg, whom it describes as Posey's managing agent, should have been allowable at hearing for any purpose, pursuant to 47 C.F.R. 1.321(d)(2), note 2 *supra*. However, the procedural point raised by Southern was not well-developed at the hearing; Southern did not even refer the ALJ to the rule section it now relies upon. Nor is the point fully briefed in the exceptions; indeed, it was not until oral argument that Southern belatedly cited case precedent in support of its position. Nevertheless, it does appear from the scant authority cited to us that, in the federal courts at least, the deposition of a party or its officer, director, or managing agent may be used by an adverse party for any purpose, even if the deponent is present at the hearing and has given oral testimony. *See* 4A Moore's Federal Practice §32.04; *Pingatore v. Montgomery Ward*, 419 F.2d 1138 (6th Cir. 1969). [4] The obverse would seem to hold, therefore; that is, that the deposition of such a person may be used in the absence of the deponent. Thus, insofar as Grogg, WPCO's station manager, may be deemed the Nussels' agent, the ALJ may have erred in disallowing use of his deposition at the hearing. Any such error was harmless, however, because we conclude, for the reasons stated below, that introduction of Grogg's deposition would not have materially aided Southern's case or decisionally affected Posey's comparative standing. *Cf. Pingatore v. Montgomery Ward, supra*, at 1142.

6. In its exceptions, Southern claims that Grogg's deposition would have been used to impeach Mrs. Nussel's testimony that she prepared WPCO's annual employment reports, that she maintained a private office at the station, and concerning her role in hiring and firing of employees. As to the employment reports, Mrs. Nussel admitted that she was mistaken in her original deposition testimony and that Grogg had prepared the reports, but clarified that she had participated in their preparation in that she directed Grogg to compile the figures for the report and that she resigned the forms that were in WPCO's public file. Tr. 76; Posey Opposition to Motion to Enlarge Issues, filed October 31, 1988, Att. E, p. 1 As to office space, the record shows that Grogg has a private office, and that Mrs. Nussel also makes use of a private office, which she sometimes shares, and that she also works out of the sales room. Tr. 92-93. Regarding employee recruitment, both Mr. and Mrs. Nussel testified that Mr. Grogg makes recommendations on hiring but that, not surprisingly, they ultimately decide and have rejected Grogg's suggestions many times. Tr. 117-118, 137-138, 194-195. Taken individually or collectively, these facts do not appear to us to support Southern's claim that Grogg's deposition testimony, if admitted, would buttress its claim that the Nussels were inactive in WPCO's management. But even if it did, there is ample additional record evidence to show that the Nussels have sufficiently participated in station operations to meet the specific daytimer preference criterion.

7. Specifically, Mrs. Nussel, WPCO's full-time general manager, in addition to hiring and firing employees, sets salaries, supervises personnel, particularly in the business and financial departments, works with Grogg on production matters, supervises payables, accounts receivables, and sales, and develops and approves promotional and sales packages. Tr. 87, 137-138, 157. For his part, Mr. Nussel, WPCO's operations manager, works at the station approximately four hours every weekday evening and ten hours on Saturday. (He is employed weekdays at General Electric). He is primarily responsible for maintenance of the physical plant and keeping the equipment operating. He meets daily with Mr. Grogg to review any problems relating to operating quality. He also supervises two part-time engineers and, along with his wife, participates in budget preparation and employee hiring and firing. Tr. 98-99, 122, 169-172, 194. We believe this testimonial summary of the managerial, supervisory, and operational activities of the Nussels, combined with the fact that Mrs. Nussel spends full-time at WPCO and Mr. Nussel approximately thirty hours a week there, is easily sufficient to meet the Commission's standards. In this regard, the Commission has clarified that the level of participation in the operation of the daytime-only facility required is not to be confused with the level of substantial participation expected of integration proposals. Only a showing that owners spent more than twenty hours per week, either individually or in the aggregate, participating in station management during the three-year period, is necesary in order to receive credit. *FM Channel Assignments, supra*, 59 RR 2d at 1229. Given this minimal requirement, we conclude that the Nussels have readily satisfied the Commission's expectations. [5] In sum, Posey is entitled to the full comparative credit awarded it by the ALJ. [6]

## OTHER MATTERS

8. Southern excepts to the ALJ's *Memorandum Opinion and Order*, FCC 88M-1782, released June 9, 1988, which declined to add an *ex parte* issue against Posey. In its April 18, 1988 petition to enlarge, Southern focused on letters written by Richard Grogg, WPCO's station manager, on October 5, 1987 to the Commission in a Rule Making proceeding, and October 7, 1987 to members of the Indiana Congressional delegation. The October 5, 1987 letter was directed to the Commission's Rule Making notice in MM Docket 87-314 dealing with abuses in the Commission's licensing processes. (*Abuses of the Commission's Processes*, 2 FCC Rcd 5563 (1987)). In addition to expressing its views on "frivolous applications", the letter also commented generally on the Commission's daytimer preference policy, which was not a subject of the Rule Making in question. *See* Southern Petition to Enlarge, Exh. 1. The October 7, 1987 letters, which were sent to

United States Senators Richard Lugar and Dan Quayle and Congressman Frank McCloskey, requested support in expediting the Mount Vernon FM proceeding now before us. Enclosed with the letters were copies of the October 5, 1987 letter to the Commission. Southern Petition to Enlarge, Exh. 2. Posey explained that the October 5, 1987 letter was written in response to a specific call for comments on the Rule Making contained in the October 1, 1987 issue of *Radio World*, and was intended to express WPCO's views in the context of the Rule Making proceeding. As for the October 7, 1987 letters, Posey stated that its co-owner, Bill Nussel, authorized Grogg to seek Congressional help in expediting the Mount Vernon applications because Nussel was frustrated by delays in processing. According to Posey, Nussel had no knowledge that the Commission's *ex parte* rules generally prohibit the solicitation of Congressional help in expediting comparative applications. Posey Opposition to Petition to Enlarge, filed May 2, 1989, Exhs. 1, 2.

9. We shall deny Southern's exception. The first of the two communications in question, that written October 5, 1987 to the Commission, was intended and, in fact, was captioned as being responsive to a request for comments in an ongoing inquiry on "methods of eliminating abuses in the broadcast licensing and frequency allocation process." Southern Petition to Enlarge, Exh. 1, p. 1. Although, as the ALJ noted, the subject matter of the letter went beyond the specific areas of inquiry mentioned in the Commission's Rule Making notice in MM Docket No. 87-314, it made no mention of the instant FM proceeding or reference to either pending application. Thus, it cannot be said that the October 5, 1987 letter was directed to the outcome or merits of this proceeding in violation of the *ex parte* proscriptions contained in 47 C.F.R. 1.1202(a) and (b). With respect to the October 7, 1987 letters, these were intended to solicit Congressional help in expediting the instant licensing proceeding. Although reference is made in the letters to Posey's interest in obtaining the FM station, there is no specific comment on the merits of its application or that of its opponent, and, indeed, there is neutral reference to "the necessity of *someone* operating a full-time broadcast facility serving Mount Vernon." (Emphasis in original) Southern Petition to Enlarge, Exh. 2. The letter, however, also incorporated the October 5, 1987 letter, which commented on the status of AM stations in the context of offering "suggested improvements to reduce the number of frivolous applications being filed for Docket 80-90 FM allocations" (*id*), which could be read, as Southern seems to argue, as implicitly seeking assistance for the existing AM licensee, Posey. The Commission prohibits any person from soliciting or encouraging others to make a prohibited *ex parte* communication, 47 C.F.R. 1.1210, but it has traditionally permitted inquiry to, or from, elected officials regarding administrative delay. *Fine Music, Inc.*, 8 FCC 2d 529 (1967); *Radio Laredo, Inc.*, 87 FCC 2d 353 (Rev. Bd.), *recon. denied*, 88 FCC 2d 901 (Rev. Bd. 1981), *rev. denied*, FCC 82-62, released February 3, 1982, *affirmed sub nom. Amigos Broadcasting, Inc. v. FCC*, 696 F.2d 128 (D.C. Cir. 1982). Although, as indicated, the communications are somewhat ambiguous as to their intent and could suggest something more than a mere complaint about delay, we believe no sanction would be appropriate even if the contacts were technically prohibited by the *ex parte* rules. It is undisputed that Posey was unfamiliar with the specific rule restrictions in question, that the incident was an isolated occurrence, that there is no record of past infractions by the licensee, and that Posey had received no prior warnings that such conduct was improper. In these circumstances, disqualification is not warranted, *see Pepper Schultz*, 4 FCC Rcd 6393, 6401-6403 (Rev. Bd. 1989) (and cases cited therein), and remand for further hearing thus would serve no useful purpose.

10. Southern also excepts to the ALJ's refusal to inquire into whether Posey falsely certified its financial qualifications. *See Memorandum Opinion and Order*, FCC 88M-3932, released November 18, 1988. Specifically, Southern contends that questions exist as to what kind of financial review was undertaken by the Nussels before they made the financial certification. We agree with the ALJ that no issue was warranted. The record shows that, prior to certifying to their financial qualifications, the Nussels prepared specific cost estimates which provided for such items as equipment, installation, site, operating costs, and application prosecution (Tr. 180-181; Posey October 31, 1988, Opposition to Motion to Enlarge, Att. E (Declaration of Ann Nussel, pp. 2-3); that the Nussels kept ledgers of their own and Posey's finances from which they prepared monthly summaries of their assets and liabilities to determine their financial condition (Tr. 53, 182, 197-201); and that before certifying, they reviewed their then-current summaries, which included bank statements and other assets as well as current liabilities, and determined that they had enough funds on deposit in banks to cover their costs of construction and operation (Tr. 198-199; Ann Nussel Declaration, p. 3). Plainly, the Nussels' uncontradicted testimony established that they reviewed their finances before certifying. *Cf. Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). In sum, no substantial question of fact was raised regarding the *bona fides* of Posey's financial certification, and the ALJ correctly denied Southern's enlargement request. *Cf. Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988), *rev. denied*, 3 FCC Rcd 4767 (1988)(misrepresentation issue must be premised on showing of substantial evidence of intent to deceive).

## CONCLUSION

11. Posey is entitled to a substantial integration preference based on the 100% v. 15% full-time credits awarded by the I.D., which we affirm. *See Louisiana Super Communications Limited Partnership*, 102 FCC 2d 1293 (Rev. Bd. 1985), *rev. dismissed*, FCC 86I-110, released August 21, 1986. Posey's application is therefore granted.

12. ACCORDINGLY, IT IS ORDERED, That the application of Posey County Broadcasting Corp. (File No. BPH-861023MD) IS GRANTED and the application of Southern Indiana Broadcasting (File No. BPH-861126MP) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

## FOOTNOTES

[1] The five criteria an applicant must meet to receive a daytimer preference are as follows:

> (i) The FM allotment applied for must be in the same community as the daytime only station;
>
> (ii) The applicant must have owned the daytime- only facility for three continuous years prior to the filing of its FM application;
>
> (iii) The daytime-only applicant must pledge to divest the AM facility within three years after the commencement date of FM operations. This pledge is required to be made within 30 days after designation of the FM application for hearing;
>
> (iv) Members of the applicant entity holding cognizable ownership interests must have spent more than 20 hours per week (either individually or in the aggregate) participating in the management of the daytime-only facility during the three year period prior to filing the FM application; and
>
> (v) The applicant must propose to be integrated in the operation of the FM station.

*Second Report and Order, supra*, 101 FCC 2d at 644-647.

[2] 47 C.F.R. 1.321(d)(2) reads as follows:

> (d) At the hearing (or in a pleading), any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:
>
> . . .
>
> (2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

[3] We cannot and will not pass upon Southern's catch-all argument that the Commission's daytimer preference is constitutionally suspect and that the I.D. should be reversed for that reason.

[4] The governing Federal Rule of Civil Procedure is substantially identical to the relevant language of 47 C.F.R. 1.321(d)(2), note 2, *supra*.

[5] While perhaps not decisional, it is also noteworthy that the record suggests that WPCO is a somewhat informally-run small station in a community of under 8,000 persons, *e. g.*, station titles are not all that important and the owners may perform non-management chores in addition to their management functions. *See* Tr. 135, 168; Posey Reply Br. at 9, citing Rand McNally 1987 Road Atlas, p. 122. In this context, we observe that in *Deep South Radio, Inc.*, 46 RR 2d 1657 (1980), the Commission rejected the notion that an applicant's majority stockholder's position at the station could be considered "merely consultative." *Id.* at 1658.

[6] In a footnote, Southern excepts to award of full-time integration credit to Mr. Nussel on the ground that he has a conflicting business interest which consumes a considerable portion of his time. The record establishes, however, that Mr. Nussel will terminate his current full-time employment at General Electric, which is his principal non-broadcast activity, in order to effectuate his integration pledge. (Posey Exh. 3). No basis for diminution of credit has been proved.

[7] In light of the result herein, we need not reach Posey's limited exceptions arguing that Southern should receive no integration credit whatever and that a misrepresentation/real party in interest issue should have been added against it.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-9**

In re Applications of

CATALINA RADIO, A CALIFORNIA LIMITED PARTNERSHIP — File No. BPH-860529MC

CRESCENT RADIO LIMITED PARTNERSHIP — File No. BPH-860530MG

For a Construction Permit for
a New FM Station on Channel 224A,
Avalon, California

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 3, 1989; Released: November 30, 1989**

By the Review Board: MARINO (CHAIRMAN) and BLUMENTHAL.

1. The Review Board has before it an "Emergency Appeal," filed November 1, 1989 by Crescent Radio Limited Partnership (Crescent), requesting that the Board reverse Administrative Law Judge (ALJ) Edward J. Kuhlmann's *Memorandum Opinion and Order*, FCC 89M-2561, released October 31, 1989. Based upon the ALJ's (prehearing) evidentiary rulings regarding the ownership/management integration proposals of both applicants in this case, Crescent asserts that "the Judge's action is tantamount to a dismissal of its application."

2. The ALJ's ruling did not deny or terminate Crescent's right to participate as a party to this proceeding. *See* 47 C.F.R. § 1.301(a)(1); *see* also *George E. Cameron, Jr. Communications*, 84 FCC 2d 345 (1981). The rule governing Crescent's appeal is § 1.301(b), which permits the filing of interlocutory appeals only if permission is first secured from the presiding ALJ. Where, as here, consent was neither sought nor obtained, an appeal will not be considered unless the appealing party has demonstrated a flagrant abuse of discretion "as would inevitably require a reversal of the Initial Decision and a hearing *de novo*, or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *Communcations Satellite Corp.*, 32 FCC 2d 533, 534 (1971); *Ocean Pines FM Partnership*, 4 FCC Rcd 3490, 3490-3491 (Rev. Bd. 1989). Crescent's appeal appears to implicate neither of these extraordinary concerns.

3. ACCORDINGLY, IT IS ORDERED, That the Emergency Appeal, filed November 1, 1989 by Crescent Radio Limited Partnership IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GEN. Docket No. 89-97**

In the Matter of

Southern California Region 5
Public Safety Plan

**ORDER**

**Adopted: November 8, 1989; Released: November 21, 1989**

By the Chief, Private Radio Bureau and the Chief Engineer:

## I. INTRODUCTION

1. By this action, we accept the regional public safety plan for the Southern California area, Region 5. The requirements for regional public safety plans are contained in the Commission's *Report and Order* in Gen. Docket No. 87-112.[1] The Region 5 Plan is the third regional plan we have accepted[2] and represents the culmination of the efforts of the many public safety organizations that participated in its development.

## II. BACKGROUND

2. On December 8, 1983, Congress directed the Commission to develop a plan to ensure that the present and future electromagnetic spectrum requirements of state and local public safety authorities be considered in the agency's spectrum allocations decisions. [3] The Commission, in response to this Congressional directive, subsequently allocated six megahertz of spectrum in the 821-824/866-869 MHz bands for use, nationwide, by public safety authorities. In making this allocation decision, however, the Commission provided that the spectrum would not be made available for licensing until a National Plan was developed to ensure the efficient use of the new allocation.

3. To assist in the development of this National Public Safety Plan, in December 1986, the Commission established the National Public Safety Planning Advisory Committee (NPSPAC) to involve parties interested in public safety in the planning effort. Then, in May 1987, following issuance of NPSPAC's *Initial Report*,[4] the Commission released a *Notice of Proposed Rule Making* [5] *(Notice)* proposing rules and policies looking toward the establishment of a National Plan for Public Safety (National Plan). Recognizing that the spectrum needs of public safety agencies differ to some extent throughout the country, the Commission proposed the establishment of regional planning committees to develop plans designed to meet the individual and joint communications needs of public safety agencies within that region. Following the receipt of extensive comments on this proposal as well as NPSPAC's *Final Report*, received on September 9, 1987, the Commission released its *Report and Order* settinging forth its National Plan for Public Safety on December 18, 1987.

4. The Commission's *Report and Order* endorsed the regional planning concept proposed in the *Notice* and recommended by NPSPAC as the best method for assuring that the new spectrum allocation is used nationwide as efficiently as possible. To this end, the Commission established fifty-five (55)[6] regions that encompassed all the land area of the United States, including Puerto Rico and the U.S. Virgin Islands. The Commission instructed each region to develop a plan for use of the newly allocated spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the region. Additionally, the Commission established various procedural and substantive requirements for each regional plan but, at the same time, invested considerable discretion in each area to decide how the public safety spectrum should be used to meet the present and future needs of state and local public safety authorities. The Commission's goal, in this regard, was to provide the various regions with the autonomy necessary to be able to design and construct systems that would meet the unique communications needs of their public safety agencies.

5. After each plan is completed and approved by its regional planning committee, it must be submitted to the Chief, Private Radio Bureau and the Chief Engineer. The plan is then placed on public notice and comments are solicited for a 45-day period. The two Bureaus jointly review each plan in conjunction with any comments submitted. After the review process, if the Bureaus determine that a plan is deficient in any of the required elements or if problems are identified by the comments, the plan is returned to the regional planning committee for further work. Once the two Bureaus have formally accepted a plan, the individual public safety entities can begin applying for licensing in the new 800 MHz spectrum.

## III. THE SOUTHERN CALIFORNIA REGION PLAN

6. Region 5 comprises ten counties in the southern part of the State of California.[7] On December 21, 1988, the Southern California Region, Region 5, submitted its plan to the Commission for review and approval. On February 16, 1989, we responded by letter stating that two of the elements required in the plan had not been properly addressed. The Region 5 Plan failed to address, other than in generalities, Element 7, how eligible entities have been prioritized in areas where not all can receive licenses, and Element 9, how the plan puts the spectrum to the best possible use by requiring system design with minimum coverage areas, by assigning frequencies so that maximum frequency reuse and offset channel use may be made, by using trunking, and by requiring small entities with minimal requirements to join together on a single system where possible. This lack of information was compounded by Region 5's list of unmet requirements for 180 channels.

7. On April 12, 1989, Region 5 submitted a revised plan that included the information we requested. The Region 5 Plan, as amended, explains in greater detail how the Regional Planning Committee made judicious use of offset channels and downtilt antennas to squeeze in as many users as possible into the newly allocated 821-824/866-869 MHz spectrum. It also explains that all

major agencies requesting large blocks of spectrum received the majority of what they could justify, and that large agencies incorporated smaller users on their planned systems, thus simultaneously meeting several agencies' needs. Some of the major agencies could not, however, satisfy their needs beyond the next five years. Plan at 48.

8. Specifically, the plan provides a summary of its major elements, including methodology for ranking applicants and assigning frequencies, channel "give-up" and reassignment criteria, implementation parameters, use, control and responsibility of the five common national channels, intra-regional mutual aid, inter-regional coordination, unsatisfied spectrum requirements, and frequency specific channel assignment and "give-up" plans. The plan states that the Regional Planning Committee used coverage overlays[8] to evaluate who could be co-channel or adjacent channel users. The Committee did not use existing computer programs. It believed that because of the unique and complex terrain factors in the region, the experience of the engineers and use of field tests would provide more realistic results and a more spectrum efficient plan. Plan at 40.

9. In its amended plan, Region 5 states that prioritization for 800 MHz spectrum was based on a matrix weighted in favor of eligibles with long standing requests for spectrum (30%), eligibles intending to use the spectrum in the protection of life and property (30%), eligibles that could show funding commitments (20%), and eligibles or groups of eligibles with multi-departmental planned use (20%). Plan at 36-37. In order to ensure maximum use of the newly allocated spectrum, especially in the most frequency congested area[9], the Southern California Region prohibited locating antennas on high mountaintops (except for mutual aid purposes), required trunking in all but exceptional cases, restricted coverage areas to a three-mile overlap, maximized use of offset channels, limited antenna heights and required use of downtilt and directional antennas, and adopted the tighter receiver specifications required by NPSPAC but not adopted by the Commission. Plan at 22-26.

10. The plan states that it was coordinated with the three adjacent regions, Northern California, Nevada, and Arizona. Attachment 3 to the plan includes copies of letters of coordination with these regions. A separate letter from Region 6, Northern California, also shows the coordination between the two regions to ensure effective statewide communications.

## IV. COMMENTS

11. The Region 5 Plan was placed on Public Notice for comments on April 27, 1989. We received eleven comments from the following parties: California Peace Officers Association, Beverly Hills Police and Fire Departments, California Department of Corrections (CDC), City of Los Angeles, County of Riverside, California Public-Safety Radio Association (CPRA), County of Los Angeles, County of Orange Communications Division (Orange), Fleet Call, Inc. (FCI), American SMR Network Association, Inc. (ASNA), and General Electric Mobile Communications (GE). We received six replies: Orange, CPRA, State of California (State), County of Los Angeles, the Southern California Regional Planning Committee (Region 5), and the Associated Public Safety Communications Officers, Inc. (APCO).

12. The public safety agencies and interests support the plan enthusiastically. GE, while supporting the plan, seeks clarification on two points. The only opposition to the plan comes from the two SMR interests, ASNA and FCI. The various comments, clarification requests and oppositions are addressed in the discussion that follows.

## V. DISCUSSION

13. We have reviewed the plan submitted for Region 5, as amended, and find that it conforms with the National Public Safety Plan and includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112. The Regional Planning Committee has made a reasonable and good faith effort to satisfy the Commission's requirements. Faced with demands in excess of the new allocation, the Regional Planning Committee used technology that could not efficiently be factored into a computer model to pack the channel assignments as tightly as possible. The plan states in part: " . . . distances between transmitters for co-channel reuse will not be held to seventy (70) mile separation. Separation of co-channel transmitters will be determined by the coverage needs of the applicant, natural barriers for separation, antenna patterning and limited ERP's where possible. System tests and/or propagation studies should also be provided to establish minimum distances for separation." Plan at 26. The plan states that users of the new spectrum will have to design their radio systems to minimize the amount of RF energy radiated into unneeded areas, and to function in the presence of interfering signals. Plan at 31.

14. When the Southern California Region filed its proposed plan for use of the newly allocated 800 MHz spectrum in Region 5, ASNA and FCI renewed their opposition to San Bernardino County's waiver to allow public safety operations on non-public safety channels[10] by filing comments in opposition to the plan. They basically argue that (1) now that the Southern California Plan is about to be accepted and the channels put into operation, the San Bernardino County public safety agencies should no longer pursue use of non-public safety offset channels, or (2) if the San Bernardino County public safety agencies received so few channels from the plan that they still need to use the non-public safety offset channels, then the plan is poorly designed and should be amended. ASNA questions the plan's judgement in meeting Orange County's needs and not San Bernardino County's with new 800 MHz spectrum. ASNA Comments at 8-9. Both organizations asked that the plan be amended to give San Bernardino County more channels for use in the western portion of the county. ASNA Comments at 9. FCI Comments at 10.

15. In their Replies, Orange, CPRA, Region 5 and State all disagree with FCI's and ASNA's allegations that Orange County's needs were met at the expense of San Bernardino's, thus leaving San Bernardino County without recourse other than to use non-public safety offset channels. Orange Replies at 3. CPRA Replies at 1. Region 5 Replies at 3. State Replies at 3. Region 5 says it did not find any one agency to be "first" in priority. Region 5 Replies at 3. Orange maintains that all the frequency congested counties were left with unmet needs and that San Bernardino County was fortunate in having the luxury of being located where use of offsets is possible. Orange Replies at 5. Orange County stresses that even with TV Channel 16 in Los Angeles and the 800 MHz

channels in San Bernardino County, there is not enough spectrum in the region. Orange Comments at 3. It says that some of its public safety agencies may not be able to implement critically needed systems because Orange County received significantly fewer channels than it needs. Orange County Comments at 3.

16. In the Commission's San Bernardino *Memorandum Opinion and Order*, it states, "The County must, however, make all reasonable attempts to satisfy its needs by use of channels offset from public safety frequencies before using other frequencies. Further, in light of the *National Public Safety Plan*, we will require the County to meet, to the extent possible, its long-term communications needs within the 6 MHz allocated for public safety in the 800 MHz band by eventually transferring operations on channels offset from non-public safety frequencies to channels or offsets in the public safety pool or made available by the regional plan."[11] The Regional Planning Committee stated that it met its various eligibles' needs "to the extent possible," as required by the language in our *MO & O* 1. On the very first page of the Southern California Plan, it states, "The planning effort has also had to take into consideration all available spectrum resources in Southern California. Other sources of relief include the UHF TV Channel 16 allocation, the Waiver for use of "Off-Sets" by San Bernardino County and the possible assignment of some additional UHF 470 to 512 MHz frequencies to Public Safety Users in the metropolitan Los Angeles area. Even though all resources have been considered, an acute shortage of spectrum will continue to exist." Plan at 1. With needs as great as those in Southern California and spectrum so scarce, the Regional Planning Committee factored in every potential resource, including give-backs that will not become immediately available. As APCO said, "It is not the fault of the County [of San Bernardino] nor the Planning Committee that there are simply not enough frequencies in the six megahertz allocation to satisfy even the immediate, let alone the future, needs of the Southern California public safety community." APCO Replies at 3.

17. CPRA and State note that Attachment 5 (Note 1) to the plan states that should any agency not be able to implement its system, consideration would be given to assigning its channels to San Bernardino County to relieve its need for offsets. CPRA Replies at 2 and State Replies at 5. Region 5 points out that the plan allows San Bernardino County to use far fewer offset channels than they originally requested, and reminds the SMRs of the protection they are afforded under the Commission's waiver. Region 5 Replies at 3-4.

18. FCI and ASNA say that the plan is based on the assumption that San Bernardino will use non-public safety offset channels "in perpetuity." ASNA Comments at 5. FCI Comments at 5 and 9. Both attempt to show that the plan's approach is inconsistent with the Commission's decision in the San Bernardino County proceeding. ASNA Comments at 2-3. FCI Comments at 8. We disagree with FCI and ASNA for the following reasons.

19. The Southern California Region was handed a challenge to fulfill as many needs as possible with the six megahertz the Commission has allocated. Like the other regions, it had to prepare a plan that its membership, comprised of interested public safety entities, would adopt. The fact that it was able to win unanimous support for the plan from its members is indicative of the fairness and careful consideration used in formulating this plan. Many eligibles did not get all the channels they expect to need over the next five years. Some of the entities so stated in their comments, yet supported the plan enthusiastically. If, as ASNA and FCI have alleged, Orange County was given more than its share of the channels so that San Bernardino County would come up short and have to use a greater number of non-public safety offset channels, the other public safety entities would have complained during this comment period. Such was not the case. CPRA and APCO contend that FCI and ASNA raised issues that are outside the scope of this proceeding. CPRA Replies at 3. APCO Replies at 4. We agree. The San Bernardino waiver was granted less than two years ago. Since that time, it has been upheld twice by the Commission. The matter pending now before our Bureaus is the Southern California Area Plan for Public Safety. As suggested by State, the fact that San Bernardino County has asked for and been given authority to satisfy its unmet needs from spectrum outside the spectrum covered by the plan does not negate the plan. State Replies at 5. The SMRs' concerns are fundamental: they are concerned that use of the offset channels will cause them interference. The Commission has put many safeguards in place.[12] Instead of delaying a proceeding that will release critically needed spectrum to a highly congested region, we intend to allow licensing to begin on the new spectrum.

20. GE, a manufacturer of 800 MHz equipment, has filed comments in all three public safety regional planning proceedings to date: New York Metropolitan, North Central and North East Texas, and now Southern California. GE supports the plan and favors its expeditious approval. GE Comments at 1. As in the other two proceedings, however, GE focuses on particular aspects of the plan and seeks clarification on two specific points. First, GE asks how the priority rankings are being awarded to wait-listed users. GE believes that wait-listed users deserve to know whether they will be ranked using the same criteria the Regional Planning Committee used to determine frequency assignments. GE Comments at 1-2. Orange replies stating that it is less likely that priority among wait-listed entities will be dictated by rank (Plan at Attachment 6) than by geographic availability of a channel. We agree with Orange. If a channel becomes available through failure to construct, lack of funding, or some other reason, it can be reassigned at the same location but not necessarily at another location. Packing the assignments closely together will render priority ranking in many cases moot. To the extent this is not the case, we would expect that the Regional Planning Committee would follow the same criteria it used for the plan. Second, GE questions the need for coded squelch for all 821-824/866-869 MHz equipment, specifically trunked. GE Comments at 2-3. Orange disagrees with GE contending that some form of *continuous* coded squelch is a necessity in densely populated areas to allow systems to differentiate between desired and undesired signals. Orange Replies at 6. The Plan calls for use of either CTCSS (Continuous Tone-Controlled Squelch Systems) or CDCSS (Continuous Digital-Coded Squelch Systems) to protect systems from receiving interference. Plan at 30. We agree with Orange County that trunked systems are as vulnerable to the effects of interference from undesired signals as are conventional systems. We, therefore, concur with the Plan's use of continuous coded squelch operation on all channels.

21. The California Department of Corrections (CDC) expresses concern over the plan's restrictive technical criteria and its reluctance to allow use of existing 800 MHz trunked equipment under waiver. CDC says it has made a "major monetary investment" in existing 800 MHz equipment. CDC Comments at 3-4. Although we sympathize with CDC's predicament, having made an investment in existing 800 MHz equipment, we support the plan's adherence to maximum spectrum efficiency. CDC may use its equipment on the mutual aid channels when necessary. CDC may continue to operate on existing channels until such time as new equipment becomes warranted. Furthermore, because CDC's operations are statewide, the two California Regional Planning Committees may find it appropriate to support a waiver request from CDC in the less frequency congested parts of the State. We note, however, that such a waiver must be granted by the Chief of the Private Radio Bureau and will be considered only upon a separate application. The Regional Planning Committee is not authorized to grant such waivers.

## VI. CONCLUSION

22. We recognize the effort that went into preparing the Region 5 Plan and commend the Regional Planning Committee for its work. The Southern California Region presented a challenge because of its large growing population and unique terrain. We are pleased to see Region 5 place restrictions on antenna heights and transmitter outputs, and encourage use of special antenna patterns to limit each system's coverage so as to reuse these channels. We are especially pleased to see how Region 5 has combined small users into larger, trunked, more efficient systems. We believe the Region 5 Plan represents a careful balance of the public safety and special emergency mobile communication needs throughout the area and will result in efficient use of the newly allocated 800 MHz Public Safety radio spectrum.

23. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 5 IS ACCEPTED. Accordingly, licensing of the 821-824/866-869 MHz bands may commence immediately in Region 5.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

## FOOTNOTES

[1] Report and Order, Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987).

[2] We accepted the New York (Region 8) Public Safety Plan on May 12, 1989, 4 FCC Rcd 4457 (1989), and the North Central and North East Texas (Region 40) Public Safety Plan on June 22, 1989.

[3] *See* Federal Communications Commission Authorization Act of 1983, December 8, 1983, P.L. 98-214, 97 Stat. 1467, Section 9(a).

[4] NPSPAC, Initial Report To the Federal Communications Commission, *published in* Appendix B, Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869, 2873-92 (1987) (*Initial Report*).

[5] Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869 (1987).

[6] The Report and Order established 48 Regions. This number and the boundaries were amended by the Memorandum Opinion and Order, 3 FCC Rcd 2113 (1988).

[7] Those counties are: San Luis Obsipo, Kern, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, San Diego, and Imperial.

[8] Coverage overlays, which are used in cellular system design, depict the expected coverage in relationship to the geopolitical boundary. Using this methodology, signal levels can be compared to those of adjacent or co-channel users within the region.

[9] The Plan defines the most frequency congested area as the County of Orange, Metropolitan areas of Los Angeles County, the southwestern portion of San Bernardino County and the western portion of Riverside County. Plan at 22.

[10] In a separate proceeding started in October, 1987, the Private Radio Bureau granted San Bernardino County a waiver to allow public safety agencies to use frequencies 12.5 kHz offset from regularly assignable public safety and non-public safety channels in the 800 MHz band. Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band, 2 FCC Rcd 6721 (1987) (*Order*). ASNA was one of five entities that filed Applications for Review of the Bureau's *Order*. In addition to these formal pleadings, the Commission received in excess of 350 letters from SMR licensees and end users expressing concern over possible interference to their operations. FCI filed a Request for Hearing and Comments on Petitions for Reconsideration in this proceeding. In September, 1988, the Commission denied the Applications for Review and FCI's Request for Hearing and affirmed the Bureau's *Order* with modifications. Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band, 3 FCC Rcd 6033 (1988) (*MO & O* 1). The Commission then issued an *MO & O* in April, 1989, in response to a Petition for Clarification of the earlier *Order* and *MO & O* 1 from the National Association of Business and Educational Radio, Inc. (NABER). Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communications System in the 800 MHz Band, 4 FCC Rcd 3830 (1989) (*MO & O* 2).

[11] *MO & O* 1 at para. 20.

[12] For example, the Commission directed the County to participate in the regional planning effort for Southern California. *MO & O* 1 at para. 17. The Commission told San Bernardino County that it had to seek spectrum relief from within the public safety frequencies first, then the public safety offset channels, and only after all of the above were exhausted from among the non-public safety offset channels. The Commission also stipulated that the County had to conduct tests under developmental authorizations prior to applying for licensing (*MO & O* 1 at para. 12); and lastly that in the event of interference to the non-public safety licensees, the County must take immediate steps to resolve any interference to previously licensed users (later extended to include all present and future end users of existing base stations, i.e. add-on users to existing SMRs and community repeaters, MO&O 1 at para 13) or the Commission may, without hearing, suspend, modify, or revoke appropriate portions of this waiver. *Order* at para. 6.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MIDAMERICAN LONG
DISTANCE COMPANY
Complainant,

v. File No. E-89-412

GENERAL TELEPHONE
COMPANY OF THE SOUTHWEST

Defendant.

**ORDER**

**Adopted: November 20, 1989; Released: December 1, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, MidAmerican Long Distance Company ("MidAmerican") filed the above-captioned formal complaint against General Telephone Company of the Southwest (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against MidAmerican during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint is due November 24, 1989. On November 17, 1989, however, MidAmerican filed a motion for leave to withdraw its complaint, stating that discussions with Defendant's counsel subsequent to the filing of the complaint established that MidAmerican did not begin to receive access services from the Defendant until after December 31, 1986.

2. On the basis of the statements contained in the Motion, we conclude that there are no longer issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that MidAmerican's Motion for Leave to Withdraw Complaint IS GRANTED, and that the above-captioned complaint proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MIDAMERICAN LONG
DISTANCE COMPANY
Complainant,

v. File No. E-89-411

THE UNITED TELEPHONE
OPERATING COMPANIES,
Defendant.

**ORDER**

**Adopted: November 22, 1989; Released: December 1, 1989**

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, MidAmerican Long Distance Company ("MidAmerican") filed the above-captioned formal complaint against The United Telephone Operating Companies (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against MidAmerican during the period from October 1, 1985 through December 31, 1986. On November 13, 1989, MidAmerican filed a motion for leave to withdraw its complaint, stating that discussions with Defendant's counsel subsequent to the filing of the complaint established that MidAmerican did not begin to receive access services from the Defendant until after December 31, 1986.

2. On the basis of the statements contained in the Motion, we conclude that there are no longer issues in controversy for the time period covered by the complaint and that this proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that MidAmerican's Motion for Leave to Withdraw Complaint IS GRANTED, and that the above-captioned complaint proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-494**

In the Matter of

Enforcement of Prohibitions
Against Broadcast Indecency in
18 U.S.C. § 1464

## NOTICE OF INQUIRY

**Adopted: October 26, 1989; Released: November 20, 1989**

By the Commission:

## INTRODUCTION

1. This *Notice of Inquiry* is in response to a remand of the record in *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (" *ACT II* "). In *ACT II*, the court granted the Commission's motion for a remand to allow it to compile a record in support of Congress' imposition of a 24-hour ban on the broadcast of indecent material. Accordingly, the Commission is initiating this proceeding to solicit public comment regarding the validity of a total ban on broadcast indecency.

2. The broadcast of indecent material is of grave concern to the Congress and this Commission. The Commission has long believed that broadcasting indecent programs during times when there is a reasonable risk of children in the audience is inimical to the public interest. Last year Congress directed the Commission to promulgate a 24-hour a day ban on broadcasting indecent material. In compliance therewith, the Commission promulgated such a ban. *See* 47 CFR § 73.3999.

3. The Commission's ban was challenged in the U.S. Court of Appeals for the D.C. Circuit in *ACT II*. Pending a decision on the merits, the court stayed enforcement of the ban. This has the effect of limiting the Commission to the regulation of indecent daytime broadcasts only under the court's previous decision in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*"ACT I"*). Before briefing and oral argument on the merits took place, the Supreme Court, in a related case, declared unconstitutional a ban on the telephone transmission of indecent messages. *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829 (1989). While the Court did not rule on the applicability of its holding to the broadcast of indecent material, Justice Scalia suggested, in *dicta*, that indecent broadcasts can be banned if "data [can] be found demonstrating the infeasibility of alternate means to provide . . . adequate protection of minors." 109 S. Ct. at 2840 (Scalia, J., concurring). In order to develop such an evidentiary record regarding broadcast indecency, the Commission obtained remand of the record in the *ACT II* case, and now undertakes this proceeding.

## BACKGROUND

4. *General Statutory Authority*. Section 1464 of the Criminal Code (18 U.S.C. § 1464) makes it unlawful to broadcast obscene or indecent language. The Communications Act of 1934 empowers the Commission to determine whether a violation of Section 1464 has occurred, and to impose administrative sanctions for violations, including the issuance of warnings, the imposition of fines, and, in the most severe cases, the revocation of licenses. 47 U.S.C. §§ 312(a)(6) and (b), 503(b)(1)(D). At the same time, Section 326 of the Communications Act prohibits the Commission from engaging in censorship or promulgating regulations "which shall interfere with the right of free speech by means of radio communication."

5. *The " Pacifica " Standard*. The Commission first articulated the definition of indecency it now uses to enforce Section 1464 in *Pacifica Foundation*, 56 FCC 2d 94 (1975). In finding the daytime radio broadcast by WBAI-FM of the twelve-minute recorded monologue "Filthy Words" was indecent, the Commission defined indecent speech as "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience."[1] Noting that certain patently offensive words were deliberately and repeatedly broadcast at a time when children were undoubtedly in the audience, the Commission concluded that the WBAI-FM broadcast was indecent. The Commission likened the regulation of indecency to the law of nuisance, which seeks to channel behavior rather than actually prohibit it. 56 FCC 2d at 98. Because the risk of exposure to children might be reduced during late evening hours, the Commission suggested that indecent material could conceivably be aired at such times, if accompanied by appropriate warnings. The Commission added that its primary objective was to limit the exposure of children to material that most parents would regard as inappropriate for them to hear. *Id.* at 98, 100.

6. The Supreme Court upheld the Commission's action against WBAI-FM in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (" *Pacifica* "). The Court determined that speech containing patently offensive sexual and excretory language was not always entitled to absolute constitutional protection, and that the context of the speech was critical to a First Amendment analysis. *Id.* at 747-48. The Court reaffirmed its holding in *Ginsberg v. New York* [2] "that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Id.* at 749. It determined that these concerns, as well as the fact that broadcast media have a "uniquely pervasive presence in the lives of all Americans" and are "uniquely accessible to children," justified special treatment of the broadcast of indecent material. *Id.* at 748-49.

7. *1987 Indecency Rulings*. In 1987, the Commission released three separate warning letters finding that portions of certain radio broadcasts were indecent. [3] In these rulings, the Commission clarified that henceforth it would apply the generic definition of indecency set forth in its 1975 *Pacifica Foundation* decision and upheld by the Su-

preme Court. In particular, potentially indecent broadcast speech would have to be examined in context to determine whether it is a patently offensive description or depiction of sexual or excretory organs or activities under contemporary community standards applicable to the broadcast medium. The broadcast of indecent material would be actionable if, based upon ratings data for the particular market involved, there were a reasonable risk that children may be in the audience. The Commission also advised broadcasters that they should no longer assume that indecent broadcasts aired after 10:00 p.m. and preceded by a warning would be legally permissible.[4]

8. In a single reconsideration order, the Commission affirmed the three individual rulings and further explained the rationale for the policy change. *Reconsideration Order*, 3 FCC Rcd 930 (1987). Based upon its reading of *Pacifica*, the Commission also determined that its authority under Section 1464 was limited and it declined to impose a total ban on broadcast indecency. Furthermore, the Commission acceded to broadcasters' requests to establish an hour after which indecent programming may be aired. The Commission stated that "12:00 midnight is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience." *Id.* at 934 n. 47.

9. *The ACT I Decision*. On July 29, 1988, the D.C. Circuit in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (" *ACT I* ") upheld the Commission's generic definition of indecency as applied in its 1987 rulings, and affirmed the Commission's warning in one case which involved the daytime broadcast of indecent material. However, the court remanded the two other cases which involved evening broadcasts (after 10:00 p.m.) because it found that the reasoning upon which the Commission based its decisions was insufficient.[5] Furthermore, the court found that the Commission had not developed an adequate record for, nor sufficiently explained, its statement that indecent material could be channeled to after midnight. *Id.* at 1342.

10. The court also rejected the Commission's suggestion that future channeling decisions could be made on a case-by-case basis because this approach could result in a chilling effect on broadcasters' First Amendment rights. The court determined that the First Amendment compelled the Commission to afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired. The court explained that an appropriate channeling rule "would give effect to the government's interest in promoting parental supervision of children's listening, without intruding excessively upon the licensees' range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech." *Id.* at 1344.

11. *ACT II*. Before the court issued its decision in *ACT I*, Congress had also begun considering the Commission's midnight indecency policy. In the Commission's 1989 appropriations bill, Congress directed the Commission to enforce the restrictions on broadcast indecency in Section 1464 on a 24-hour per day basis, stating that:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.[6]

In response, on December 19, 1988, the Commission adopted a new rule prohibiting broadcast indecency and obscenity on a 24-hour basis.[7] A number of petitioners filed suit challenging the rule in *ACT II*, and on January 23, 1989, the D.C. Circuit stayed the implementation of the rule pending judicial review.

12. *Sable*. On June 23, 1989, the Supreme Court issued its ruling in *Sable*, a case involving a statutory ban on obscene and indecent telephone transmissions. In *Sable*, the Court upheld the ban on obscene telephone transmissions, but enjoined the enforcement of the statutory ban insofar as it applied to indecent messages. The Court found that the record in that case, which appeared to demonstrate "feasible and effective" alternatives short of a ban to keep indecent dial-a-porn messages away from children, did not support a total ban on indecent telephone messages. After noting that indecent speech is protected by the First Amendment, the Court observed that "[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 109 S. Ct. at 2836. The Court later used slightly different language in describing the relevant constitutional standard, noting that the means chosen by the government must be "carefully tailored" or "narrowly tailored" to achieve the regulatory ends. *Id.* at 2836, 2839.[8]

13. In a concurring opinion, Justice Scalia suggested that a total ban on indecent communications in a medium could be constitutional if "data [can] be found demonstrating the infeasibility of alternate means to provide . . . adequate protection of minors." *Id.* at 2840 (Scalia, J., concurring). The Court held, however, that the record in *Sable* did not show that a complete ban on indecent dial-a-porn was necessary to protect children from salacious material transmitted over the telephone. *Id.* at 2839.

## DISCUSSION

14. The Commission undertakes this inquiry to build a factual record and solicit public comment relevant to a judicial determination of the validity of a total ban on broadcast indecency. Congress imposed the 24-hour ban on indecent broadcasts "to protect the American people, especially children . . . ."[9] Accordingly, this inquiry focuses on Congress' primary interest in protecting children.[10]

15. For the purpose of this inquiry, we ask that parties premise their comments on the Commission's current definition of broadcast indecency -- language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. Such broadcasts are actionable when there is a reasonable risk that children may be in the audience. This definition has been affirmed by the Supreme Court, has survived vagueness and overbreadth challenges in the D.C. Circuit, and was impliedly relied upon by Congress in directing the Commission to enforce

Section 1464 on a 24-hour basis. If any commenters believe that the Commission should redefine indecency or modify its application of the present definition for the purpose of enforcing a 24-hour ban,[11] they should state their proposed definition and explain why it is preferable to the Commission's current definition.

*I. Protecting Children*

16. It is well-established that protecting children from exposure to indecent material is a compelling government interest. Most recently, the Court stated in *Sable:*

> We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.

109 S. Ct. at 2836 (citation omitted). The Court has also recognized the government's interest in assisting parents in supervising their children. *See Ginsberg v. New York*, 390 U.S. at 639 ("parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society;" parents are "entitled to the support of laws designed to aid discharge of that responsibility"); *Pacifica*, 438 U.S. at 749-50 (government's interest in the "well-being of its youth," along with its interest in "supporting parents' claim to authority in their own household," justified regulating indecent broadcasts).[12] We solicit comment on whether a 24-hour ban on broadcast indecency advances these interests.

17. The more difficult issue is whether a record can be developed to demonstrate that a 24-hour ban is a sufficiently limited means of restricting children's access to indecent broadcasts. In order to develop such a record, we need to compile information on many interrelated subjects, such as: (1) children's access to the broadcast media as well as their actual viewing and listening habits; (2) the feasibility of alternative means of restricting children's access to broadcasts, including time channeling alone or in conjunction with parental supervision, ratings or warning devices or alternative broadcast technologies; and (3) the availability of indecent material for adults through non-broadcast means. As a preliminary matter, we note that how we define "children" in this proceeding will influence, if not determine, the parameters for the type of evidence we will need to compile on these issues.

*A. Definition of Children*

18. In our 1987 enforcement rulings, we expressed concern for protecting children ages 17 and under from indecent broadcasts. In *ACT I*, however, the D.C. Circuit criticized the Commission for not adequately justifying our reliance on data for teenagers ages 12 to 17 in these orders. The court noted that, in the Commission's 1976 legislative proposal to clarify and modify Section 1464, we had defined children as 12 years of age or younger, and it questioned whether we were now shifting, without adequate explanation, the focus of our concern to children over 12 years old. 852 F.2d at 1342. Several factors have caused us to reevaluate our rationale for selecting age 12 in our 1976 legislative proposal,[13] and suggest that we should include teens ages 12 to 17 in this inquiry.

19. First, in enacting the 24-hour ban, it appears that Congress envisioned protecting children ages 17 and under. Senator Helms, the author of the legislation, relied on data regarding children ages 12 to 17 to support the ban.[14] Moreover, Congress defined "minors" as children 17 and under in its original dial-a-porn statute,[15] which banned obscene or indecent telephone communications to minors.[16] Congress' determination that children 17 and under should be protected from obscene and indecent speech is also consistent with the views of the majority of state legislatures. Forty-eight of the 50 states and the District of Columbia have varying forms of criminal statutes which penalize the dissemination of harmful sexual material to minors. *See* Appendix A. Of these states, 39 define minor as 17 and under, and six (plus the District of Columbia) define minor as under age 17.[17] Finally, we note that the voluntary code adopted by the Motion Picture Association of America ("MPAA") selected children under 17 as the group to protect from unsupervised exposure to indecency in motion pictures. Under the MPAA code, use of indecent material as legally defined in *Pacifica* in a film would presumably merit an "R" rating, which prohibits children under 17 from viewing the film unless accompanied by an adult.[18]

20. In sum, the fact that Congress and the vast majority of state legislatures have chosen to protect children ages 17 and under from exposure to sexual material clearly supports including children ages 12 to 17 within the scope of this inquiry. Therefore, we ask that commenters assume that the term "children" includes all children ages 17 and under in supplying information for this proceeding. Nevertheless, we invite comment on these preliminary findings and generally on the age group to which the government's interest in protecting children should extend.[19]

*B. Children's Listening and Viewing*

21. In developing an evidentiary record in this proceeding, the most critical element will be gathering information to show whether children's listening and viewing habits support a 24-hour ban rather than a more limited restriction on broadcast indecency, such as time channeling. In *Sable*, the Supreme Court suggested that a ban cannot be justified if "only a few of the most enterprising and disobedient young people will manage to secure access to [the indecent material]." 109 S. Ct. at 2838.[20] Therefore, we solicit information on children's access to the broadcast media and their actual listening and viewing habits, particularly with respect to whether there is a reasonable risk that children will be in the broadcast audience at all times of the day or night. The evidentiary record compiled on this subject is relevant both to whether the 24-hour ban is a sufficiently limited means of regulating broadcast indecency as well as to whether time channeling is a feasible alternative to the 24-hour ban.

*1. Children's Access to the Broadcast Media*

22. As previously noted, the Court in *Pacifica* stressed that the context of the speech -- that it occurred in the broadcast media -- was critical to its constitutional analysis. The Court specifically recognized two significant aspects of broadcasting: its "uniquely pervasive presence in the lives of all Americans," and its unique accessibility to children, even those too young to read. 438 U.S. at

748-49. Furthermore, in enacting the 24-hour ban, Congress expressed concern about the pervasiveness and accessibility of the broadcast media.[21] Therefore, we seek to develop a factual record regarding these qualities of broadcasting, particularly with respect to whether they support a total ban on indecent broadcasting.

23. Available data confirm the pervasiveness of the broadcast media in our society. Audio and visual broadcast media are present in virtually every household in the U.S. Of the 90.4 million households that have television, 63% have more than one set. *Nielsen Report on Television 1989*, at 3, Nielsen Media Research, 1989 (" *Nielsen Report* "). Although seasonally affected, the average daily TV viewing per household is approximately seven hours. *Id.* at 6. In addition, there is a consensus among researchers that children spend a large amount of time watching television,[22] which is confirmed by the ratings data. In November 1988, TV households with children viewed an average of 59 hours per week, whereas adult-only households viewed only 46 hours per week. *Id.* at 7. The weekly viewing for children ages 2 to 17 years old ranged from 21 hours to almost 26 hours.[23]

24. Radio appears to be an even more pervasive medium than TV, with over 530 million radios presently in use in the U.S.[24] Ninety-nine percent of all households have radios and each household has, on average, over five radios.[25] Over 130 million cars have radios. Another 37.8 million radios are in trucks, vans and recreational vehicles. Almost 78% of persons ages 12 and over listen to radio for a minimum of five minutes daily, and 96% listen for at least five minutes weekly. Over 83% of all teenagers listen to radio at least once a day and over 99% at least once a week.

25. Furthermore, data indicate that television and radio are easily accessible to children. With respect to television, a comprehensive national study of 817 American households with children between the ages of 6 and 17 conducted in 1980 showed that 35% of the children have a television set of their own, or one available for their use (" *1980 Family Media Study* ").[26] The availability of a set for the child's own personal use varied from 25% for 6 to 8 year olds to 45% for older teenagers. A 1989 media consumption survey of 21,000+ Santa Barbara county students, kindergarten through twelfth grade (" *The Wired Bedroom* "), suggests that these figures are higher today. The Santa Barbara study showed that 44% of these children had a TV in their own bedroom (38% K - 6th grade; 50% 7 - 12th grade).[27]

26. Studies show that a child's access to radio is even greater. A 1989 survey of 213 homes with children under 12 in the Champaign, Illinois area, conducted by Ellen Wartella of the University of Illinois, revealed that 65% of children ages 6 to 12 own their own radio and 35% own their own headphone radio. For children up to age 5, 35% own their own radio and 9% own their own headphone radio.[28] A child's opportunity for unsupervised access to radio is further demonstrated by the Santa Barbara study, which showed that 80% of the children sampled had a radio in their own bedroom (74% K - 6th grade and 88% 7 - 12th grade). *The Wired Bedroom* at 1. Moreover, studies indicate that children place a high value on watching television and listening to the radio.[29]

27. We ask for comment on this data as well as any additional information that either supports or refutes these findings concerning the pervasiveness of the broadcast media and its accessibility to children.

*2. Actual Listening and Viewing Habits*

28. The issue is whether and to what extent children are in the listening and viewing audience 24 hours per day, particularly during late evening and nighttime hours. In beginning to build a record in this area, we have attempted to address the *ACT I* court's concerns regarding listening and viewing data. Specifically we have attempted, where possible, to compare the numbers of children in the listening or viewing audience with the total numbers of children studied. Moreover, we have attempted to compare children's listening and viewing with adults' listening and viewing for the areas studied.[30]

29. *Radio Listening.* Our preliminary review of radio ratings and surveys has yielded little quantitative data or information on radio listening patterns of children under age 12.[31] However, radio listening data for children ages 12 to 17 is more readily available. Table 3 in Appendix B compares radio listening habits of children ages 12 to 17 to adult listening habits for selected time frames day and night. This table indicates that during any part of the day or night, including from midnight to 6:00 a.m., a higher percentage of children (ages 12 to 17) than adults listen to radio.[32] Over half of all teens listen to radio between midnight and 6:00 a.m. at least once a week. This exceeds the percent of women (39.4%) and men (45.5%) over 18 who listen to the radio between midnight and 6:00 a.m. Furthermore, teens' post-midnight listening averages 2 hours 46 minutes per week. *See Radio Facts* at 11.

30. Absolute national audience figures also illustrate the degree of post-midnight radio listening among children ages 12 to 17. The teen listening audience between midnight and 6:00 a.m. peaks at 1,471,000 teens between 12:00 to 12:15 a.m., decreases gradually to a low of 309,000 teens between 3:45 to 4:00 a.m., and then increases to 1,429,000 teens between 5:45 to 6:00 a.m.[33] The average quarter-hour teen audience for the entire six hour block of midnight to 6:00 a.m. is 716,000 teens. The average one day cume (the estimated number of *different* persons who listen to radio for a minimum of five minutes within a specified time frame) for teens between midnight and 6:00 a.m. is 3,533,000 teens. That is, from 12:00 a.m. to 6:00 a.m. on any given day, 3,533,000 different teenagers in the United States listen to the radio for at least five minutes. The weekly (seven day) cume for teens listening between midnight and 6:00 a.m. is 10,896,000 teens. Table 4 in Appendix B presents these figures as percentages of the total audience for day and night time frames. These data show that children ages 12 to 17 constitute 10% to 12% of the total listening audience (12 and over) from midnight to 6:00 a.m., and that this proportion is generally consistent for daytime listening as well. We seek comment on these data, as well as additional pertinent data reflecting teens' and adults' listening habits.

31. As noted above, there appears to be less data available on radio listening by children under 12. Relevant information may be gleaned, however, from the data regarding ownership of, or access to, radios by children. As noted earlier, the Wartella Study (¶ 26) showed that 65% of children ages 6 to 12 in Champaign, Illinois own radios and 35% own a headphone radio. *See Television and Beyond*, *supra* note 27. The Santa Barbara survey found that 74% of kindergarten through 6th grade students (roughly ages 5 to 11) have radios in their own bedrooms. *The Wired Bedroom* at 2. These studies suggest that there

is a potential for substantial radio listening by children under 12. We have been unable to determine, however, whether children under 12 listen between midnight and 6:00 a.m. In this regard, we request information on the listening habits of children ages 12 and under for the entire 24-hour day, but particularly from midnight to 6:00 a.m.

32. *Television Viewing*. Reported ratings data demonstrate that children are in the viewing audience throughout the day and evening hours. *See* Appendix B, Table 1 and Appendix C. Unlike radio, there is no publicly reported data reflecting television viewing by age between the nighttime hours of 1:45 a.m. and 6:00 a.m.[34] Available data show, however, that children, particularly those ages 12 to 17, are in the viewing audience until the latest reported time period. Table 1, appearing in Appendix B, presents data found in the 1989 *Nielsen Report* depicting nationwide television viewing in percentages of total viewing time by age group for certain periods of the day. The data show that between 3% (for ages 2-5) and 8% (for ages 12-17) of children's weekly TV viewing occurs between 11:00 p.m. and 1:00 a.m. This compares to 10% of adult viewing that occurs during this time.

33. Appendix C presents Arbitron data which depicts the percentage of persons by age group that watch TV from 6:00 p.m. to 1:45 a.m. in four markets collected in February and July 1988.[35] These data show that, particularly in large media markets and in summer months,[36] generally the same percentage of children ages 12 to 17 as adults watch television during the late evening hours (until 1:45 a.m.). In fact, the percentage of late night teen viewers exceeds the percentage of late night adult viewers during the summer in at least one market.[37] In contrast, the percentage of children (ages 2 to 11) who are viewing TV is lower than the percentage of teen/adult viewers, and generally drops to 5% or below by approximately 10:30 to 11:00 p.m. without regard to market or time of year.

34. Although no reported data depict nighttime viewing by age, Nielsen data estimate the percentages of homes using TV from 1:00 a.m. to 6:00 a.m. *See* Appendix B, Table 2. From this data, we computed (also using Nielsen data) estimates of the minimum and maximum number of persons viewing during one-half hour increments from 1:00 a.m. to 6:00 a.m. At the post-1:00 a.m. peak (1:00 to 1:30 a.m.), a minimum of 20.8 million and a maximum of 53.5 million people are watching TV. At the post-1:00 a.m. low point (5:30 to 6:00 a.m.), between 4.5 and 11.6 million people are watching. *Id*. We solicit comment on whether any assumptions can be drawn from available data as to how many of these nighttime viewers are children. For example, given the close relationship between adult and teen viewing during the 11:00 to 1:00 a.m. (or 1:45 a.m.) time frame demonstrated by both the Nielsen and Arbitron data, and the listening data which show that there are proportionately more children (ages 12 to 17) than adults awake and listening to the radio throughout the night, is it reasonable to assume that at least some significant number of these nighttime viewers are children, particularly those ages 12 to 17?

35. We solicit comment on any reasonable implications that can be drawn from these reported data regarding nighttime viewing of children and adults. In addition, we request that parties submit further studies or data regarding children's, teens' and adults' television viewing, particularly between the hours of 1:00 a.m. and 6:00 a.m. In their comments, parties may also want to consider the impact and relevance of such variables as market size, time of year, and time zone, which our preliminary findings indicate affect teens' viewing statistics.

36. Finally, in support of the 24-hour ban, Senator Helms noted that video cassette recorders ("VCRs") may permit children to gain access to indecent broadcasts, irrespective of the time they are aired.[38] Sixty-four percent of U.S. households own video cassette recorders. *Nielsen Report* at 11. The Santa Barbara study found that 13% of students in kindergarten through twelfth grade (12% of K-6th grade; 17% of 7 - 12th grade) have VCR's in their own bedrooms. *The Wired Bedroom* at 2. Seven percent of all recording occurs between 1:00 a.m. and 6:00 a.m; more than half of all recording activity is done with the TV off; and over 80% of programming that is recorded is from broadcast television stations. *Nielsen* Report at 11. Collectively, these facts contribute to the possibility that indecent material, broadcast at any time, can later be viewed by children without their parents' knowledge. We seek comment on the possibility that delayed access to indecent broadcasts, irrespective of the hour of the broadcast, undermines the effectiveness of time channeling. In this regard, we believe that data are relevant regarding (1) the availability of VCR equipment to children; (2) the ability of children to use VCR equipment; and (3) children's actual use of the equipment for delayed viewing.

### *C. Alternatives to a 24 - Hour Ban*

37. In this section we discuss and solicit comment on possible alternatives to a 24-hour ban, including: (1) channeling indecent broadcasts to a time of day when children most likely will not be exposed to them, including reliance on parental supervision to protect children; (2) program rating codes or pre-broadcast warning devices; and (3) feasible technologies that can be used to keep indecent broadcasts from children.

#### *1. Time Channeling / Parental Supervision*

38. The feasibility of this alternative depends on whether indecent broadcasts can be channeled to a time of day or night when there is not a reasonable risk that children will be exposed to them. We have already set forth our preliminary findings on children's viewing and listening habits above, and we ask parties to comment on the effectiveness of channeling in light of this data and/or any additional data that parties may have on this subject. We also ask parties to comment on what constitutes a "reasonable risk" -- how many children must be in the audience to make the risk unreasonable. In addition, we request comment on any differences between the television and radio media that relate to the effectiveness of channeling, such as the availability of VCR's to circumvent channeling restrictions.

39. One important consideration with respect to the feasibility of time channeling is the extent to which parents are able to protect children from exposure to indecent broadcasts. The *ACT I* court stressed that the government's interest in regulating broadcast indecency was to promote parental supervision of children's viewing and listening. 852 F.2d at 1344. Therefore, we request comment on several relevant issues. First, are parents physically able to supervise their children's viewing and listening given the numbers of radios and televisions in American homes and cars? Second, do parents supervise

or monitor their children's broadcast viewing or listening? In particular, do parents and children view or listen together; if so, to what extent and during what periods of the day or evening do they co-view or listen? If they do not view or listen together, are parents aware of what programs their children are listening to or watching during all periods of the day and evening? Are there different co-viewing or listening habits for television and radio? Third, are parents concerned about their children's exposure to indecent broadcasts? We have set forth some of our preliminary findings on these issues below.

40. As discussed previously (*see* ¶¶ 23 & 25 *supra*), the data on the availability of televisions in U.S. households appear to suggest that a significant number of children have unsupervised access to television and that it may be difficult for parents to supervise their children's television viewing on a 24-hour a day basis. Although we have examined a number of studies suggesting that children watch television in the company of their parents,[39] we have found no study that documented what amount of children's viewing is supervised or unsupervised, and the times of day supervised and unsupervised viewing occurs. Data collected in the *1980 Family Media Study* indicate that TV usage in all households surveyed with children ages 6 to 17 exceeds the combined viewing of each parent. *Id.* at 33. The residual TV usage must therefore be attributed to children. We used these data to compare supervised versus unsupervised children's viewing time. Our results, set forth in Table 5 of Appendix B, demonstrate that the maximum amount of unsupervised children's daily viewing ranges from 212 to 222 minutes and the minimum ranges from 40 to 54 minutes.

41. These unsupervised viewing figures in Table 5 are understated because they are based on an assumption that there is one TV per household and that independent concurrent viewing (parent-child or parent-parent viewing at the same time on different sets) does not occur. Under the more reasonable assumptions of multiple TV sets per household,[40] and independent concurrent viewing,[41] these figures would be higher.[42] These data indicate that there is significant unsupervised television viewing by children on a daily basis. However, we have found no data from which we can determine the amount of unsupervised viewing by time of day. We request comments on our analysis, as well as independent data regarding supervised and unsupervised viewing, particularly by time of day.

42. There appears to be even less direct data on whether radio listening by children is supervised or unsupervised. Several different studies indicate that: each household has an average of 5 radios (¶ 24 *supra*), almost two- thirds of all children (6 - 12) own their own radios, 35% of children (6 - 12) own their own headphone radio (which by definition permits solitary listening), and 80% of children (K - 12 grade) have radios in their own room (¶ 26 *supra*). These data suggest that a significant number of children have the opportunity for unsupervised radio listening and we can infer that they, in fact, engage in unsupervised radio listening. Studies also indicate that, in contrast to TV viewing, radio listening is more likely to be done without adult supervision.[43] We also note that radios are generally less expensive and more portable than TVs. Thus, radio offers greater opportunity for children to listen alone or with peers outside the purview of adults.

43. We have also attempted to determine the level of parental concern about children's listening and viewing. In the *1980 Family Media Study* (¶ 25 *supra*), researchers looked at parents' attempts to control their children's (ages 6 to 17) television viewing. The results are depicted in Table 6 of Appendix B as percentages of mothers who have rules regarding the kinds of programming and how much TV children can watch. That table suggests that parental efforts to control their children's viewing behavior decline as their children grow older, with the most notable reduction occurring when their children turned 15. The study does not examine whether parental supervision drops off because parents do not believe supervision is necessary, or because, given children's ready access to television, it may be difficult to supervise what children watch, especially during late evening hours. The study does demonstrate that even in the 6 to 8 year age group, more than 25% of the mothers do not restrict the types of programs the child may watch; and more than 40% do not limit the amount of television the child may watch.

44. We request comment on all these preliminary findings regarding time channeling and parental supervision as well as generally on the feasibility of these or other alternatives. We note particularly our inability to locate data on listening habits of children under age 12 and on parental supervision of children's listening and viewing between midnight and 6:00 a.m. and ask for any facts relevant to these issues. We request that any parties asserting that time channeling and parental supervision are feasible alternatives submit the evidence on which they rely to support that conclusion.

### *2. Ratings / Warning Devices*

45. Another possible alternative to a 24-hour ban is the use of a voluntary industry rating code, similar to the MPAA code, for television and radio broadcasts. The ratings could be published in television and radio guides, and announced prior to each program. There is a question, however, as to whether such codes and prior warnings are an effective mechanism to protect minors from indecent programming. In *Pacifica*, the Supreme Court determined that prior warnings were ineffective:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

438 U.S. at 748-49.

46. Available data suggest that the random tuning behavior referred to in *Pacifica* is more prevalent today than it was in 1978. Remote control devices are now found in 75% of TV households, *see* P. Ainsle, "A Mobile Audience," *CHANNELS / Field Guide 1989*, at 127 (" *A Mobile Audience* "), and have given rise to a new type of viewing behavior called "grazing."[44] In one recent study of adults 18 and over, almost one-half of the persons surveyed, engaged in "grazing." *Id.* The youngest age group surveyed (18 to 24 year olds) reported the highest amount of grazing (60%). Although no children were surveyed, it appears reasonable to infer from the data available that children under 18 are exposed to different programming in rapid succession without warning as to content either because they graze, or because they are

co-viewing with others who are grazing. Push button channels or scanners on radios likewise facilitate grazing in the radio context.

47. We request comment and data on the effectiveness of ratings and prior warnings as an alternative to a 24-hour ban on indecent broadcasts particularly given the existence and use of remote control and scanning devices. We note that the effectiveness of this alternative is also integrally related to parents' ability and willingness to supervise their children's viewing and listening, and we request parties to consider these factors in commenting on this alternative.

*3. Broadcast Technologies*

48. Finally, we seek comment on whether there are any feasible broadcast technologies that could restrict children's access to indecent broadcasts. One type of technology that might be considered is the use of the FM or TV aural subcarrier, such as Television's "Second Audio Program" (or "SAP") channel, for the broadcast of audio indecency.[45] Specially designed receivers with expanded reception capabilities are required to decode programming broadcast on a subcarrier; thus only minors with access to decoders would have access to such programming. This type of technology may provide a means of protecting children from indecent broadcasts, while at the same time make such broadcasts available to adults. The effectiveness of such a technology, as an alternative to a 24-hour ban, depends upon whether it could, in fact, restrict minors' access to indecent material. For example, would decoder devices become standard features on all radio and television receivers, making subcarrier broadcasts as accessible to minors as current traditional broadcast signals?[46] Are locking devices on decoders feasible and would they effectively restrict children's access to subcarrier broadcasts?

*D. Availability of Non - Broadcast Alternatives for Indecent Material*

49. Even if the evidence on children's viewing and listening ultimately supports a total ban on broadcast indecency rather than time channeling or other more limited means of regulation, the Commission must also address whether a 24-hour ban impermissibly infringes upon adults' first amendment rights by permitting them to hear and view only what is acceptable to children. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) (adults may not be reduced to reading only what is acceptable to children). In *Pacifica*, the Court recognized that non-broadcast alternatives to broadcast indecency were available to adults:

> The Commission's action does not by any means reduce adults to hearing only what is fit for children. *Cf. Butler v. Michigan*, 352 U.S. 380, 383. Adults who feel the need may purchase tapes and records or go to theatres and nightclubs to hear these words. 438 U.S. at 750 n.28. *Cf. Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 69-70 n.18 (1983).

50. In view of these decisions, we seek comment on whether non-broadcast alternatives, including cable with a lock-box capacity, videocassettes, audiocassettes, records, motion pictures, theatres and nightclubs, provide adults with sufficient access to visual and audio indecency. Do the costs associated with each alternative reduce its practical availability to adults? Are there differences in the types of alternatives available for video versus audio indecency?

51. We note that cable television, an alternative not mentioned by the *Pacifica* Court, provides adults with access to programming designed for mature audiences,[47] while at the same time offers the means to protect children from exposure to such programming. Under the Cable Act, parental control devices, such as "lock-boxes" and "parental keys," must be supplied on request by cable companies. 47 U.S.C. § 544(d)(2)(A). These devices, not generally available to control over-the-air broadcast reception, enable parents to block out channels or specific programs carried on cable that they do not want their children to watch. We also note that indecent movies are available to adults. In 1988, the MPAA rated 63% of the 555 films it reviewed as "R" or "X." As Table 7 of Appendix B shows, both the total number and the percentage of "R" rated movies has steadily increased since 1985.[48]

## CONCLUSION

52. Because the *ACT II* court will rely on the record in this proceeding in making its decision, our goal is to develop as complete a record as possible. Accordingly, we ask parties to address all issues thoroughly and, wherever possible, to support their statements with statistical data. We also request that parties submitting statistical studies or analyses indicate the factual basis for and methodology of such studies in their submissions.[49]

## PROCEDURAL MATTERS

53. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 19, 1990, and reply comments on or before February 16, 1990. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission.

54. Further information on this proceeding may be obtained by contacting Marilyn Mohrman-Gillis, Legal Branch, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

## FOOTNOTES

[1] *Id.* at 98. The Commission also distinguished indecent from obscene speech, which is governed by the standards established in *Miller v. California*, 413 U.S. 15 (1973). It is well-established that obscene speech is not protected by the First Amendment, and accordingly, the Commission's authority to ban the broadcast of obscenity on a 24-hour a day basis has not been challenged and is not at issue here.

[2] 390 U.S. 629 (1968). In *Ginsberg*, the Court upheld a state statute that prohibited the sale to minors (17 and under) of offensive sexual material deemed by the legislature to be obscene as to children.

[3] *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987) (*"WYSP (FM)"); Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987) (" *KPFK - FM* "); and *The Regents of the University of California*, 2 FCC Rcd 2703 (1987) (" *KCSB - FM* ").

[4] The Commission noted that current evidence indicating that there was a reasonable risk that children (defined as 17 and under) were still in the audience after 10:00 p.m. warranted a reevaluation of this position.

[5] Specifically, the court noted that the Commission in its 1987 rulings: (1) did not indicate the size of the audience for the specific radio stations in question; (2) failed to explain why, in apparent contrast to its 1976 legislative proposal targeting children under 12 for protection from indecent material, it included teens (ages 12-17) in the relevant age group for channeling; (3) failed to compare (in *KPFK - FM)* the number of teens in the radio audience with the total number of teens in the listening area; and (4) failed to explain (in *KCSB - FM)* why it determined that the potential exposure of only four percent of all children in Santa Barbara amounted to a "reasonable risk" for channeling purposes. *Id.* at 1341-1342.

[6] *See Making Appropriations for the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes*, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

[7] 47 CFR § 73.3999 (1988). *Order in Enforcement of Prohibitions Against Broadcasting Obscenity and Indecency in 18 U. S. C. § 1464*, 4 FCC Rcd 457 (1988). The new rule tracks the language of the statute as follows: "The Commission will enforce the provisions of Section 1464 of the United States Criminal Code, 18 U.S.C. § 1464, on a twenty-four hour per day basis in accordance with Public Law No. 100-459."

[8] Other cases discussing the appropriate constitutional standard for government content regulation include *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45 (1983); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

[9] 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (statement of Sen. Helms).

[10] An alternative theory for regulating broadcast indecency is to protect the public's right to be free from indecent material in the privacy of their homes. In *Pacifica*, the Supreme Court stated that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. 726, 748, *citing Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); *id.* at 759-60 (Powell, J., concurring in part). In cases before and after its *Pacifica* decision, the Court has acknowledged the government's substantial interest in protecting the privacy of the home. *See, e.g., United States v. Orito*, 413 U.S. 139 (1973) and *Carey v. Brown*, 447 U.S. 455 (1980). We solicit comment on whether the government's interest in preserving the privacy of the home, or any additional alternative theory, supports a 24-hour ban, and on the evidence required to prevail under such a theory.

[11] In his concurrence in *Sable*, Justice Scalia stated, "[t]he more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation [of] minors" from indecent material. 109 S. Ct. at 2839. Parties may wish to comment, for example, on how Justice Scalia's observation may affect the issues raised in this proceeding.

[12] In *ACT I*, the court reasoned that the government's interest in protecting children from indecent material and parents' interest in determining whether their children should be exposed to indecent material coalesce into a single interest: the government's interest in facilitating parental supervision of children's listening and viewing. 852 F.2d at 1343. In *Ginsberg*, however, the Supreme Court noted that, notwithstanding parents' interests in supervising their children, "[t]he state also has an independent interest in the well-being of its youth." 390 U.S. at 640.

[13] We selected age 12 in our 1976 proposal because it was "the accepted upper limit for children's programming in the industry and at the Commission." We considered but rejected the generally recognized age of majority -- 18 -- because "it would be virtually impossible for a broadcaster to minimize the risk of exposure to 18-year-olds." 122 Cong. Rec. at 33,364 & 33,367 n.119 (1976). We now note that while age 12 may be the appropriate age limit for "children's programming," children's programming issues differ from concerns related to protecting children from exposure to indecent broadcasts. Furthermore, we now recognize that the difficulty of minimizing the risk of exposure to 12 to 17 year olds is not a sufficient reason to exclude these ages from the category of children to be protected.

[14] 134 Cong. Rec. S9912, *supra* note 9. *See* note 32 *infra*.

[15] Pub. L. 98-214, § 8(b), 97 Stat. 1470 (1983). Ultimately Congress amended this statute to completely ban indecent telephone communications. Pub. L. 100-297, 102 Stat. 424 (1988) (codified as amended at 47 U.S.C. § 223(b)).

[16] The Supreme Court in *Sable* recognized the government's "compelling interest of preventing *minors* from being exposed to indecent telephone messages." 109 S. Ct. at 2839 (emphasis added). Presumably the Court, in recognizing this interest, relied on Congress' original definition of minor as 17 and under. *Cf. Ginsberg v. New* York, 390 U.S. at 631 (compelling government interest in protecting minors under 17 from non-obscene material); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (compelling interest in protecting high school students from indecent speech).

[17] Appendix A. While the definition of what constitutes harmful sexual material to minors varies, most of the states and the District of Columbia define material harmful to minors under the type of variable obscenity standard articulated in *Ginsberg v. New York*, 390 U.S. at 635.

[18] Under the MPAA system, a movie receives an "R" rating if it contains "adult-type" material regarding language, violence, nudity, sexuality or other content. Use of more than one sexually-derived word as an expletive, or use of even one sexually-derived word in a sexual context requires an "R" rating. Furthermore, no one under 17 is to be admitted to "X" rated movies (films with an accumulation of sexually connected language, explicit sex, or excessive and sadistic violence). Valenti, J., "The Voluntary Movie Rating System," 1987 ed. at 4-8.

[19] It is already well-established that sexually explicit material is harmful to children. *See, e.g., Ginsberg v. New York*, 390 U.S. at 641-43. Commenters are also invited to submit information on the magnitude of harm caused from exposure to this material, particularly with respect to older children, to update the record in this regard.

[20] On the other hand, according to Justice Scalia, how few children render the risk unacceptable is directly related to the risk of harming children through exposure to indecent material. 109 S. Ct. at 2839. Thus, what constitutes a reasonable risk of children in the audience is not an objective fact, but rather requires some discretionary judgment.

[21] "Television and radio are the most pervasive and persuasive means of communication in our society. Televisions and radios have permeated every aspect of American society. Indecent material comes directly into our homes, into our living rooms and assaults the millions of Americans that still find this filth repugnant." 134 Cong. Rec. S9912, *supra* note 9.

[22] *See, e.g.*, D.R. Anderson & Collins, "The Impact on Children's Education: Television's Influence on Cognitive Development," U.S. Department of Education, Office of Research Working Paper No. 2 at 33 (1988); "The Dynamics of Children's Television Viewing, Summary of Highlights of M/E Marketing Presentation at the 15th Annual INTV Convention " (Jan. 1988) (*"INTV Report"*); B. Lee, "Why Families View Together," 9 *Television and Families* 24 (1986) (*"Families Together"*); S. Banks, "Children's Television Viewing Behavior," 44 *J. Marketing* 48 (1980); B. Greenberg, Mass Media and Adolescents (Sept. 1988) (unpublished).

[23] *Nielsen Report* at 7. Weekly TV viewing by female teens averaged 21 hours 18 minutes; male teens averaged 22 hours 36 minutes; children ages 6 to 11 averaged 23 hours 17 minutes; and children ages 2 to 5 averaged 25 hours 42 minutes. *Id.*

[24] Radio Advertising Bureau, *Radio Facts for Advertisers 1989-1990* (1989) (*"Radio Facts"*).

[25] *Id.* at 3. There are 5.6 radios per household. These radios are spread throughout the various rooms of the household (67% of living rooms, 58% of bedrooms, and 50% of kitchens have radios).

[26] Newspaper Advertising Bureau, Inc., *Mass Media in the Family Setting:Social Patterns in Media Availability and Use by Parents* (March 1980).

[27] Office of the County Superintendent of Schools, Santa Barbara, CA, *The Wired Bedroom* (May, 1989). We note that the median household income of Santa Barbara County ($31,935) exceeds that for the entire U.S. ($27,310), Donnelly Marketing, Stanford, CT. We solicit comment on the effect of the county's household income on the representativeness of this data.

[28] E. Wartella, Television and Beyond: Children's Video Media in One Community, (May 1989) (to be published in *Communication Research*, Feb. 1990).

[29] For example, in a study using the same sample as the *1980 Family Media Study* (*see* ¶ 25 & note 26 *supra* ), over 80% of the children reported spending their free time watching TV, and they rated TV the highest across all ages except 15 to 17, where listening to the radio was rated higher. Newspaper Advertising Bureau, Inc., *Children, Movie-going and the* Newspaper (July 1979) (*"1979 Family Media Study"*).

[30] *See* note 5 *supra*. In reviewing the Commission's enforcement actions against specific stations, the *ACT I* court requested data broken down by station. For the purpose of this inquiry, we believe that individual station data would not be useful in determining whether channeling prescriptions are feasible as applied to all broadcasters and would be extremely difficult and time consuming to obtain. Moreover, such data are unnecessary to determine children's listening and viewing habits and do not reflect the prevalence of random tuning. *See* ¶ 45 *infra*. We invite comment on whether it is feasible or useful to obtain data by specific radio station.

[31] In their summary of academic research on children and audio media, Christenson and Lindof comment on the dearth, during the past thirty years, of analysis of children's use of radio. *See* P.G. Christenson & T.R. Lindof, "The Role of Audio Media in the Lives of Children," 9 *Popular Music & Soc.* 25 (1983).

[32] Indeed, Senator Helms noted that the latest Arbitron ratings for New York, Los Angeles and Chicago show that one third of all children between the ages of 12 and 17 listen to the radio after midnight in those cities. 134 Cong. Rec. 59912, *supra* note 9.

[33] Statistical Research, Inc., *RADAR 38 Fall 1988 Vol. 1* (1988). SRI estimates that there are 20,254,000 teens in the U.S. excluding Alaska and Hawaii.

[34] In the *Nielsen Report*, viewing from 1:00 a.m. to 6:00 a.m. is lumped into a "Remainder" time period which also includes the daytime periods of 6:00 to 10:00 a.m. Mon./Fri. and 7:30 to 8:00 p.m. Mon./Fri. Arbitron reports data reflecting viewing by age until 1:45 a.m.

[35] *Arbitron Ratings Television, Daypart Audience Estimate Summary*, Feb. & July 1988. We examined two eastern time zone television markets: Washington, D.C. (top 50 market) and Richmond, Virginia. (between markets 50 and 100); and two central time zone markets: Chicago, Illinois (top 50) and Des Moines, Iowa (50 to 100).

[36] These data generally show that children's (particularly ages 12 to 17) viewing patterns vary by market and time of the year. They demonstrate: (1) that children's viewing is later in large urban (*i.e.*, top 50) markets and in the summer months when school is out of session.

[37] In Washington, D.C. 19% teens as compared to 15% adults are in the audience at midnight in July (App. C, Chart 16).

[38] "Furthermore, with VCR recording machines and programmable tape decks, children can record this garbage and watch and listen to it later. This creates a new problem of delayed access, and renders the FCC's channeling concept futile." 134 Cong. Rec. S9912, *supra* note 9.

[39] *See, e.g., INTV Report, supra* note 22 (mothers' availability in the weekday afternoons affects children's viewing); *Families Together, supra* note 22 (in single-set homes, 83% of children's (under 18) prime time (8-11 p.m.) viewing was in the company of adults; in multiple-set households, the comparable figure was 72%).

[40] *See* Table 5, Column A (study shows an average of 1.9 TV's per household).

[41] *See Families Together, supra* note 39 (co-viewing is lower in households with multiple sets).

[42] If we assume, for example, that all of a child's viewing in two-television households occurs on a separate set from the parents', the maximum number of unsupervised child viewing minutes can be as high as 357 to 375 (the average daily minutes a household uses TV contained in Column B of Table 5) depending on the child's age.

[43] *See* P.G. Christenson & P. DeBenedittis, "Eavesdropping on the FM Band: Children's Use of Radio," 36 *J. Communications* 27, 34 (1986)

[44] A viewer wanders or "grazes" through the entire channel capacity until finding something interesting enough to hold the viewer's attention. *A Mobile Audience* at 127.

[45] While TV teletext systems could be used to transmit video material, teletext systems can only convey "computer-like" animated graphics, and not actual life-like video camera scenes.

[46] In this regard, we note that SAP-equipped stereophonic television receivers, designed to pick up the SAP channel, are already available in the marketplace.

[47] As of September 1989, 50.9 million households, or 56.4% of the total TV households subscribed to cable, and 73.9 million, or 87.3% of the total TV households were passed by cable. *Broadcasting*, Sept. 11, 1989. While we have not been able to ascertain the volume of "adult" programming available on cable, we note that cable offers a significant number of unedited movies for home viewing.

[48] These figures understate the availability of indecent films. MPAA notes that most producers of pornographic movies do not submit their films to the MPAA Board, but rather apply an "X" rating themselves. "The Voluntary Movie Rating System," *supra* note 18 at 5.

[49] We are placing the individual reports, articles, and other data referred to herein in the docket of this proceeding in order to enable parties to provide comments on this specific material.

## APPENDIX A

### State Statutes Prohibiting the Dissemination of Harmful Material to Minors

| State | Statute | Minor |
|---|---|---|
| Alabama | Knowingly display or distribute to minor material indecent for minors.* Ala. Code § 13A-12-171 (1988). | unmarried under 18 |
| Arizona | Recklessly furnish to minor item harmful to minors.* Ariz. Rev. Stat. Ann. § 13-3506 (1988). | under 18 |
| | Knowingly place explicit sexual material harmful to minors* on public display visible or accessible to minors. Ariz. Rev. Stat. Ann. § 13-3507. | under 18 |
| Arkansas | Knowingly sell, loan or exhibit to minor material harmful to minors.* Ark. Stat. Ann. § 5-68-502 (1987). | under 17 |
| California | Knowingly distribute or exhibit to minor any harmful matter.* Cal. Penal Code § 313.1 (West 1989). | under 18 |
| Colorado | Knowingly sell, loan or exhibit to child material harmful to children.* Colo. Rev. Stat. § 18-7-502 (1986). | under 18 |
| Connecticut | Knowingly promote to minor material obscene as to minors.* Conn. Gen. Stat. Ann. § 53a-196 (1985). | under 17 |
| Delaware | Provide obscene material** to person under age 18. Del. Code Ann. tit. 11 § 1361 (1987). | under 18 |
| | Knowingly disseminate to minor material harmful to minors.* Del. Code Ann. tit. 11 § 1365. | under 18 |
| D.C. | Knowingly provide to minor material which taken as a whole is patently offensive based on adult community standard of what is suitable for minors. D.C. Code Ann. § 22-2001 (1981). | under 17 |
| Florida | Knowingly sell, rent or loan to minor material harmful to minors.* Fla. Stat. Ann. § 847.012 (1989). | under 18 |
| | Knowingly exhibit material harmful to minors* in retail establishment. Fla. Stat. Ann. § 847.0125. | under 18 |
| Georgia | Knowingly disseminate to minor material harmful to minors.* Ga. Code Ann. § 16-12-103 (1988). | under 18 |

| | | |
|---|---|---|
| Hawaii | Knowingly disseminate to minor material pornographic for minors.* Hawaii Rev. Stat. § 712-1215 (1988). | under 16 |
| Idaho | Knowingly disseminate to minor material harmful to minors.* Idaho Code § 18-1515 (1987). | under 18 |
| Illinois | Knowingly distribute or exhibit to child under 18 any harmful material.** Ill. Ann. Stat. ch. 38, § 11-21 (Smith-Hurd 1979). | under 18 |
| Indiana | Knowingly disseminate or display to minor matter harmful to minors.* Ind. Code Ann. § 35-49-3-3 (Burns 1985). | under 18 |
| Iowa | Knowingly disseminate or exhibit obscene material* to minor. Iowa Code Ann. § 728.1 (West 1979). | under 18 |
| Kansas | Knowingly display or disseminate to minor material harmful to minors.* Kan. Stat. Ann. § 21-4301c (1988) | unmarried under 18 |
| Kentucky | Knowingly distribute or exhibit obscene materials** to minor. Ky. Rev. Stat. § 531.030 (1985). | under 18 |
| Louisiana | Intentionally sell, exhibit or distribute material harmful to minors.*** La. Rev. Stat. Ann. § 91.11 (West 1989). | unmarried under 17 |
| Maine | Knowingly disseminate obscene matter* to minor. Me. Rev. Stat. Ann. tit. 17-A, § 2911 (1988). | under 18 |
| Maryland | Willfully or knowingly sell, display or distribute obscene material** to person under 18. Md. Ann. Code art. 27, § 419 (1987). | under 18 |
| Mass. | Knowingly disseminate to minor matter harmful to minors.* Mass. Ann. Laws ch. 272, § 31 (Michie/ Law. Co-op. 1989). | under 18 |
| Michigan | Furnish obscene** printed matter to person under 18. Mich. Stat. Ann. § 28.337 (Callaghan 1981). | under 18 |
| Minnesota | Knowingly disseminate or display to minor material harmful to minors.* Minn. Stat. Ann. § 617.292 (West 1989). | under 18 |
| Mississippi | Knowingly disseminate sexually oriented material*** to person under 18. Miss. Code. Ann. § 97-5-27 (1989). | under 18 |

| | | |
|---|---|---|
| Missouri | Knowingly or recklessly furnish to minor material pornographic for minors.* Mo. Ann. Stat. § 573.040 (Vernon 1989). | under 18 |
| Montana | Knowingly provide obscene material** to anyone under 18. Mont. Code Ann. § 45-8-201 (1987). | under 18 |
| | Knowingly display offensive sexual material.* Mont. Code Ann. § 45-8-202. | under 18 |
| Nebraska | Knowingly sell, display or provide to minor material harmful to minors.* Neb. Rev. Stat. § 28-808 (1985) | unmarried under 18 |
| | Knowingly exhibit to minor motion picture, show, or presentation harmful to minors.* Neb. Rev. Stat. § 28-809. | unmarried under 18 |
| Nevada | Knowingly sell or loan to minor, or exhibit for sale to adult in a manner that allows minor access, any material harmful to minors.* Nev. Rev. Stat. § 201.265 (1985). | under 18 |
| N. Hampshire | Knowingly provide to minor material harmful to minors.* N.H. Rev. Stat. Ann. § 571-B:2 (1985). | under 18 |
| New Jersey | Knowingly sell obscene material*** or exhibit obscene film*** to person under 18. N.J. Stat. Ann. § 2C:34-3 (West 1982). | under 18 |
| New Mexico | Knowingly provide to minor visual representation harmful to minors.* N.M. Stat. Ann. § 30-37-2 (1989) | under 18 |
| | Knowingly display printed material harmful to minors* in retail establishment open to general public. N.M. Stat. Ann. § 30-37-2.1. | under 18 |
| | Knowingly exhibit to minor motion picture harmful to minors.* N.M. Stat. Ann. § 30-37-3. | under 18 |
| New York | Knowingly disseminate to minor material harmful to minors.* N.Y. Penal Law § 235.21 (McKinney 1980). | under 17 |
| N. Carolina | Person 18 or older knowingly disseminate obscene material*** to minor under 16. N.C. Gen. Stat. § 14-190.7 (1987). | under 16 |
| | Person 18 or older knowingly disseminate obscene material*** to minor under 13. N.C. Gen. Stat. § 14-190.8. | under 13 |

| | | |
|---|---|---|
| Hawaii | Knowingly disseminate to minor material pornographic for minors.* Hawaii Rev. Stat. § 712-1215 (1988). | under 16 |
| Idaho | Knowingly disseminate to minor material harmful to minors.* Idaho Code § 18-1515 (1987). | under 18 |
| Illinois | Knowingly distribute or exhibit to child under 18 any harmful material.** Ill. Ann. Stat. ch. 38, § 11-21 (Smith-Hurd 1979). | under 18 |
| Indiana | Knowingly disseminate or display to minor matter harmful to minors.* Ind. Code Ann. § 35-49-3-3 (Burns 1985). | under 18 |
| Iowa | Knowingly disseminate or exhibit obscene material* to minor. Iowa Code Ann. § 728.1 (West 1979). | under 18 |
| Kansas | Knowingly display or disseminate to minor material harmful to minors.* Kan. Stat. Ann. § 21-4301c (1988) | unmarried under 18 |
| Kentucky | Knowingly distribute or exhibit obscene materials** to minor. Ky. Rev. Stat. § 531.030 (1985). | under 18 |
| Louisiana | Intentionally sell, exhibit or distribute material harmful to minors.*** La. Rev. Stat. Ann. § 91.11 (West 1989). | unmarried under 17 |
| Maine | Knowingly disseminate obscene matter* to minor. Me. Rev. Stat. Ann. tit. 17-A, § 2911 (1988). | under 18 |
| Maryland | Willfully or knowingly sell, display or distribute obscene material** to person under 18. Md. Ann. Code art. 27, § 419 (1987). | under 18 |
| Mass. | Knowingly disseminate to minor matter harmful to minors.* Mass. Ann. Laws ch. 272, § 31 (Michie/ Law. Co-op. 1989). | under 18 |
| Michigan | Furnish obscene** printed matter to person under 18. Mich. Stat. Ann. § 28.337 (Callaghan 1981). | under 18 |
| Minnesota | Knowingly disseminate or display to minor material harmful to minors.* Minn. Stat. Ann. § 617.292 (West 1989). | under 18 |
| Mississippi | Knowingly disseminate sexually oriented material*** to person under 18. Miss. Code. Ann. § 97-5-27 (1989). | under 18 |

| | | |
|---|---|---|
| Missouri | Knowingly or recklessly furnish to minor material pornographic for minors.* Mo. Ann. Stat. § 573.040 (Vernon 1989). | under 18 |
| Montana | Knowingly provide obscene material** to anyone under 18. Mont. Code Ann. § 45-8-201 (1987). | under 18 |
| | Knowingly display offensive sexual material.* Mont. Code Ann. § 45-8-202. | under 18 |
| Nebraska | Knowingly sell, display or provide to minor material harmful to minors.* Neb. Rev. Stat. § 28-808 (1985) | unmarried under 18 |
| | Knowingly exhibit to minor motion picture, show, or presentation harmful to minors.* Neb. Rev. Stat. § 28-809. | unmarried under 18 |
| Nevada | Knowingly sell or loan to minor, or exhibit for sale to adult in a manner that allows minor access, any material harmful to minors.* Nev. Rev. Stat. § 201.265 (1985). | under 18 |
| N. Hampshire | Knowingly provide to minor material harmful to minors.* N.H. Rev. Stat. Ann. § 571-B:2 (1985). | under 18 |
| New Jersey | Knowingly sell obscene material*** or exhibit obscene film*** to person under 18. N.J. Stat. Ann. § 2C:34-3 (West 1982). | under 18 |
| New Mexico | Knowingly provide to minor visual representation harmful to minors.* N.M. Stat. Ann. § 30-37-2 (1989) | under 18 |
| | Knowingly display printed material harmful to minors* in retail establishment open to general public. N.M. Stat. Ann. § 30-37-2.1. | under 18 |
| | Knowingly exhibit to minor motion picture harmful to minors.* N.M. Stat. Ann. § 30-37-3. | under 18 |
| New York | Knowingly disseminate to minor material harmful to minors.* N.Y. Penal Law § 235.21 (McKinney 1980). | under 17 |
| N. Carolina | Person 18 or older knowingly disseminate obscene material*** to minor under 16. N.C. Gen. Stat. § 14-190.7 (1987). | under 16 |
| | Person 18 or older knowingly disseminate obscene material*** to minor under 13. N.C. Gen. Stat. § 14-190.8. | under 13 |

## APPENDIX B

### TABLE 1

### Weekly TV Viewing Activity for Children, Adults and All Persons

| | CHILDREN | | | | ALL |
|---|---|---|---|---|---|
| | 2-5 | 6-11 | 12-17 | ADULTS | PERSONS 2+ |
| Mon.-Sun. 11 pm-1 am | 3% | 4% | 8% | 10% | 9% |
| Sat. 1-8 pm/Sun. 1-7 pm | 10% | 12% | 12% | 12% | 11% |
| Sat. & Sun. 7 am-1 pm | 12% | 12% | 7% | 4% | 6% |
| Mon.-Fri. 10 am-4:30 pm | 21% | 11% | 11% | 14% | 14% |
| Mon.-Fri. 4:30 pm-7:30 pm | 16% | 18% | 17% | 14% | 14% |
| Mon.-Sat. 8-11 pm, & Sun. 7-11 pm (prime-time) | 21% | 28% | 32% | 31% | 31% |
| Remainder (1-10 am Mon./Fri. & 1-7 am Sat./Sun. & 7:30-8 pm Mon./Fri) | 17% | 15% | 13% | 15% | 15% |
| | 100% | 100% | 100% | 100% | 100% |

Source: Nielsen Report on Television 1989, p. 8.

TABLE 2

TV Viewing Between the Hours of 1:00 and 6:00 A.M.

| TIME | A % Homes Using TV | B Number of Homes Using TV (Min. No. of Persons in Audience) | C Maximum No. of Persons in Audience |
|---|---|---|---|
| 1:00 a.m. | 23% | 20,792,000 | 53,539,400 |
| 1:30 a.m. | 18% | 16,272,000 | 41,900,400 |
| 2:00 a.m. | 15% | 13,560,000 | 34,917,000 |
| 2:30 a.m. | 11% | 9,944,000 | 25,605,800 |
| 3:00 a.m. | 11% | 9,944,000 | 25,605,800 |
| 3:30 a.m. | 9% | 8,136,000 | 20,950,200 |
| 4:00 a.m. | 8% | 7,232,000 | 18,622,400 |
| 4:30 a.m. | 6% | 5,424,000 | 13,966,800 |
| 5:00 a.m. | 6% | 5,424,000 | 13,966,800 |
| 5:30 a.m. | 5% | 4,520,000 | 11,639,000 |
| 6:00 a.m. | 6% | 5,424,000 | 13,966,800 |

Source: Nielsen Report on Television 1989

Methodology: We multiplied the percentage of homes using TV between 1:00 a.m. and 6:00 a.m. (Column A, Nielsen Report at 5) by 90.4 million, the estimated number of households in the U.S. with television (Nielsen Report at 3) to obtain the number of homes using TV between 1:00 a.m. and 6:00 a.m. (Column B). We then multiplied the number of homes using TV during these hours by 2.575, the average number of persons in each home (232.8 million people in TV households divided by 90.4 million TV households, Nielsen Report at 4), to obtain the maximum number of persons in the audience (Column C).

TABLE 3

Percentage of Men, Women, Children and All Persons Who Listen to Radio for at Least 5 Minutes/Week

| Mon.-Sun. | Persons 12+ | Men 18+ | Women 18+ | Children 12-17 |
|---|---|---|---|---|
| 24 Hrs. | 96.0% | 96.3% | 94.8% | 99.5% |
| 6-10 am | 87.2 | 88.0 | 85.8 | 90.4 |
| 10 am-3 pm | 84.3 | 83.7 | 84.6 | 85.5 |
| 3 pm-7 pm | 82.9 | 83.3 | 80.7 | 91.0 |
| 7 pm-Mid. | 65.8 | 64.0 | 62.4 | 88.5 |
| Mid.-6 am | 43.5 | 45.5 | 39.4 | 53.8 |

Source: Radio Facts For Advertisers 1989 - 1990, Radio Advertising Bureau, 1989, at 10. This table displays the percent of all persons nationwide in each age group who listen to the radio for a minimum of five minutes per week within each given time frame.

TABLE 4

Audience Estimates for All Radio Stations by Selected Daypart

| 12:00 a.m. to 6:00 a.m. | Children (12-17) | Total Persons (12+) | Children as % of Total |
|---|---|---|---|
| Average quarter-hour | 716,000 | 6,960,000 | 10.2 |
| Average one day cume | 3,533,000 | 35,432,000 | 10.0 |
| Seven day weekly cume | 10,896,000 | 86,313,000 | 12.6 |
| 6 am to 12 midnight | | | |
| Average quarter-hour | 2,437,000 | 29,573,000 | 8.2 |
| Average one day cume | 16,638,000 | 151,622,000 | 11.0 |
| Seven day weekly cume | 20,145,000 | 190,105,000 | 10.6 |

Source: RADAR 38, Fall 1988, Vol. 1 at 1.

TABLE 5

Availability and Household Use of TV by Families with Children

| | A | B | C | D | E | F |
|---|---|---|---|---|---|---|
| | Avg. No. of TV Sets | Avg. Daily HUT Level (minutes) | Avg. Time Mother Watches TV (minutes) | Avg. Time Father Watches TV (minutes) | Est. Minimum Unsup. Child Viewing | Est. Maximum Unsup. Child Viewing |
| Total Fam.: | 1.9 | 361 | 173 | 148 | 40 | 213 |
| By age of child: | | | | | | |
| 6-8 | 1.7 | 360 | 174 | 145 | 41 | 215 |
| 9-11 | 1.8 | 360 | 169 | 138 | 53 | 222 |
| 12-14 | 2.0 | 357 | 160 | 143 | 54 | 214 |
| 15-17 | 2.1 | 375 | 171 | 163 | 41 | 212 |

Data in Columns A through D of Table 5 were derived from the 1980 Family Media Study (see note ___ supra). Column B contains the number of minutes each day the average household in the sample used television. This is the Household Using TV or "HUT" level. Column D is based on the mothers' reports in families where a male household head was present. To compute Column E, the minimum number of unsupervised minutes, we subtracted both parents' average daily viewing from the average daily HUT level for each category (Column B - (Column C + Column D)). This calculation assumes that there is only one TV per household, and that the two parents never watch simultaneously. To compute Column F, the maximum number of unsupervised child viewing minutes, we subtracted one parent's average daily viewing time from the average daily HUT level (Column B). In order to maximize the number of unsupervised minutes, but assuming only one TV set per home, we subtracted the smaller number from either Column C or D because it represents the greatest difference from the total viewing time.

Source: Mass Media in the Family Setting: Social Patterns in Media Availability and Use by Parents, Newspaper Advertising Bureau, Inc., March 1980, p. 33.

TABLE 6

Family Rules About Children's TV Viewing

| | Rules Re: Kind of Programs | Rules Re: How Much TV |
|---|---|---|
| Total sample of children: | 58% | 44% |
| By age of child: | | |
| 6-8 | 72% | 57% |
| 9-11 | 69% | 50% |
| 12-14 | 54% | 40% |
| 15-17 | 29% | 24% |

Source: Mass Media in the Family Setting: Social Patterns in Media Availability and Use by Parents, Newspaper Advertising Bureau, Inc., March 1980, p. 36.

TABLE 7

Ratings of Movies Released 1985-1988

| Year | Total No. of Movies Rated | No. of R Rated Movies | Percent of Total | No. of X Rated Movies | Percent of Total |
|---|---|---|---|---|---|
| 1985 | 356 | 200 | 56.2% | 1 | 0.3% |
| 1986 | 391 | 227 | 58.1% | 0 | - |
| 1987 | 483 | 295 | 61.1% | 2 | 0.4% |
| 1988 | 555 | 347 | 62.5% | 2 | 0.4% |

Source: Public Affairs Office, Motion Picture Association of America.

## APPENDIX C

This appendix contains Charts 1 through 16 depicting the percent of the populace (by age group) that are watching television at any time during the normal broadcast day (6:00 am to 2:00 am) for four selected markets. For each market two national audience sweep periods were used, February and July of 1988. The time of day (horizontal axis) is in one-half hour increments until 10:30 pm, and quarter-hour increments thereafter. The four markets are:

1) Chicago, IL charts 1-4

2) Des Moines, IA charts 5-8

3) Richmond, VA charts 9-12

4) Washington, DC charts 13-16

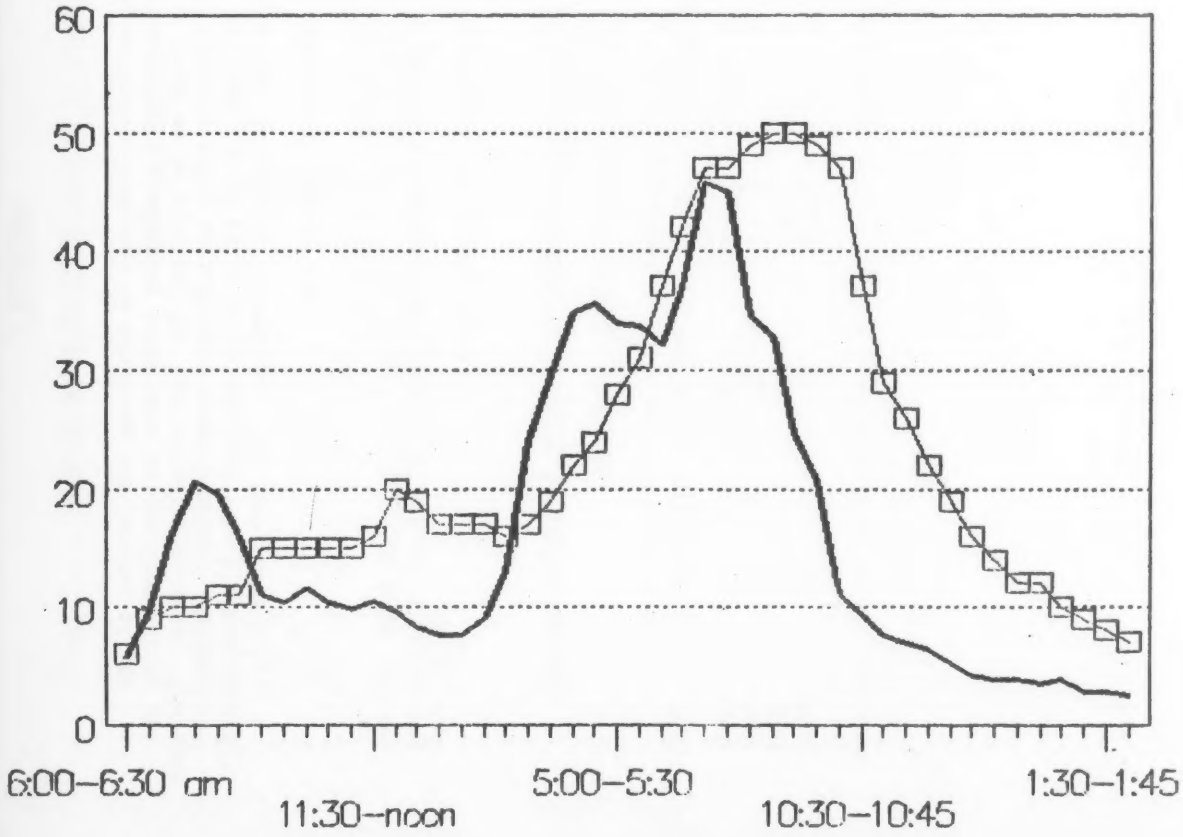
Source: Arbitron Ratings Television Daypart Audience Estimates Summary, February and July 1988.

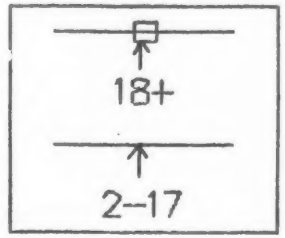
6:00–6:30 am 11:30–noon 5:00–5:30 10:30–10:45

CHART 1

# Chicago

## February 88



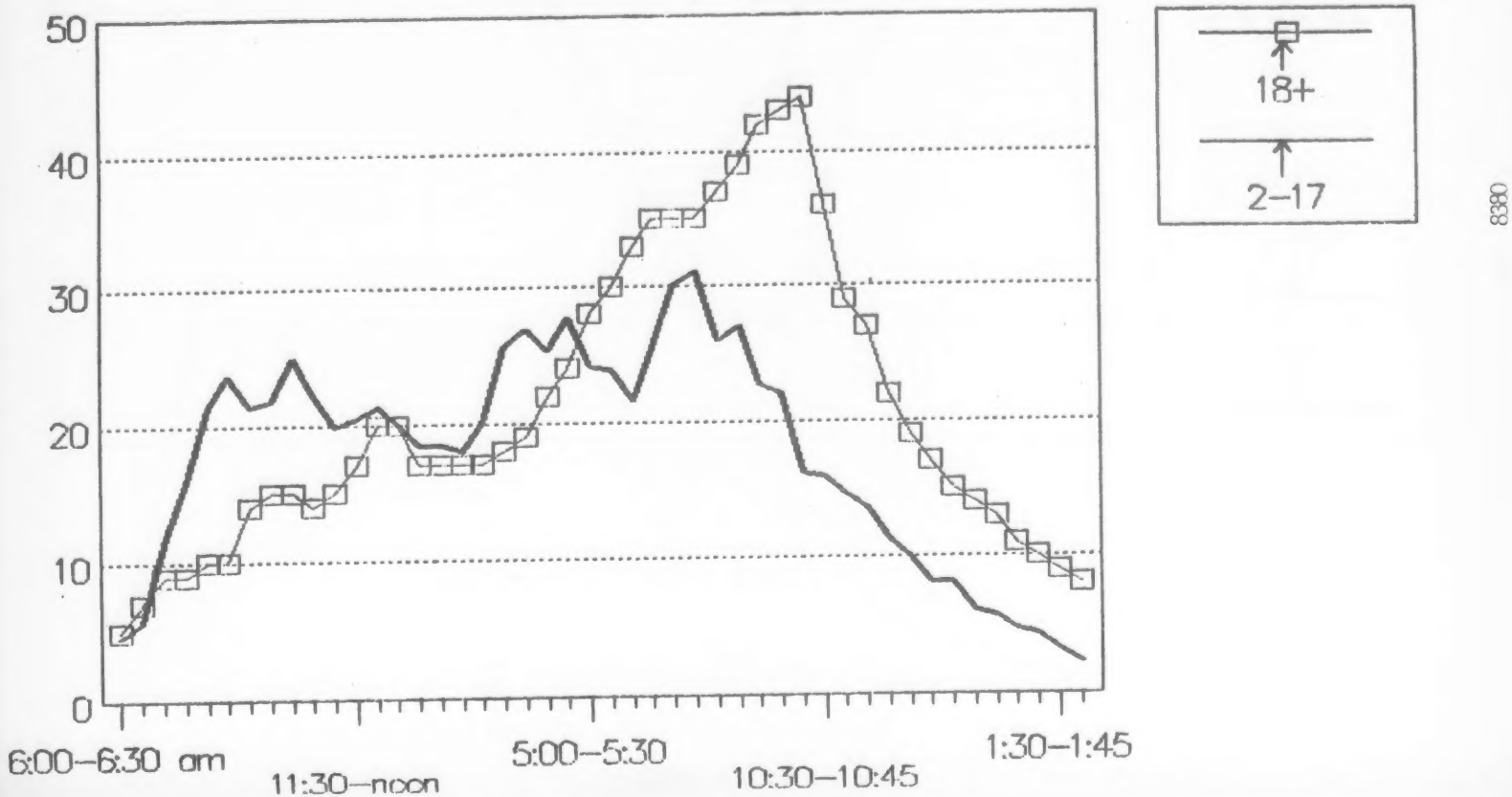




8379

CHART 2

# Chicago

## July 88

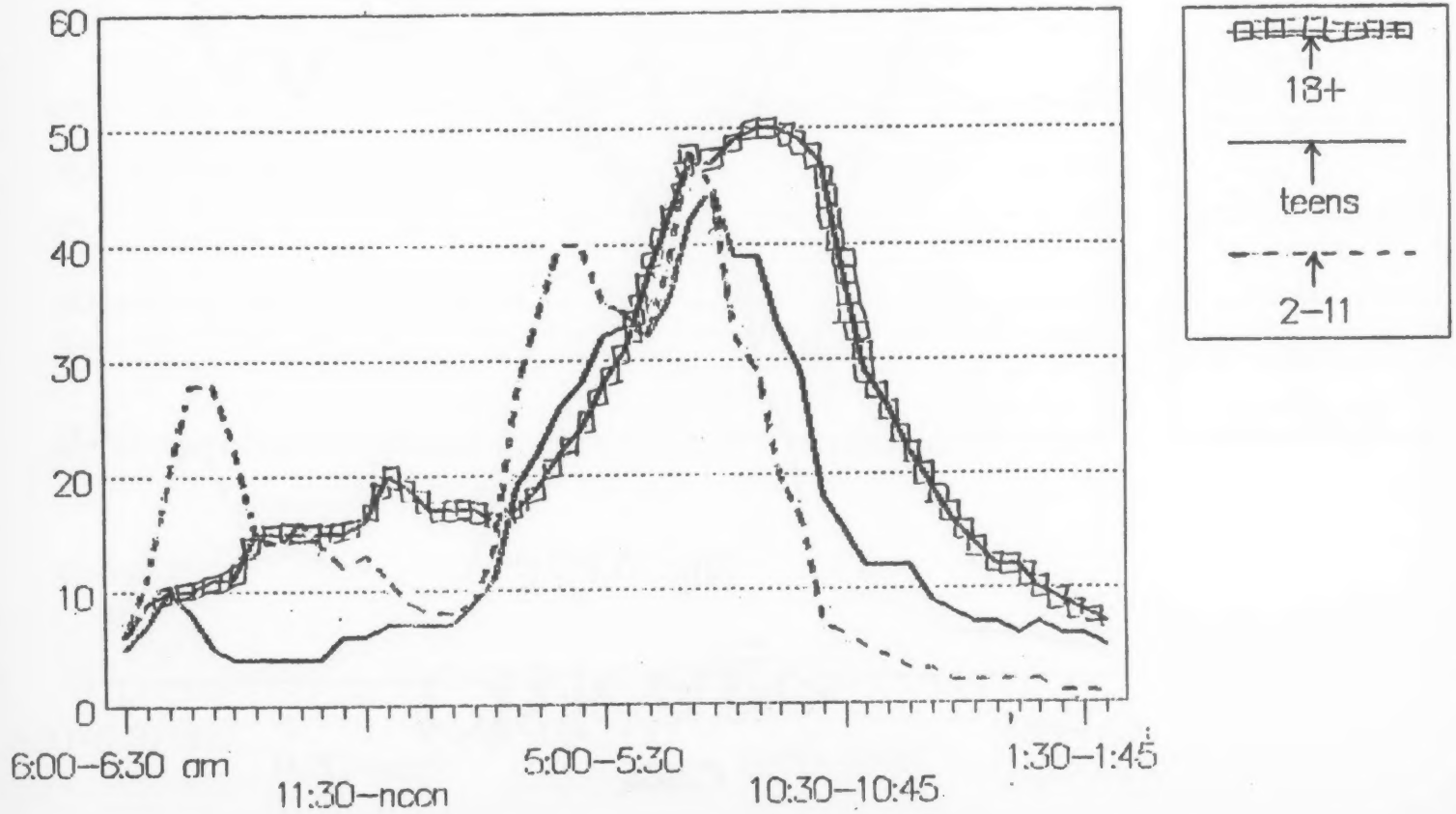



8880

CHART 1

# Chicago

## February 88

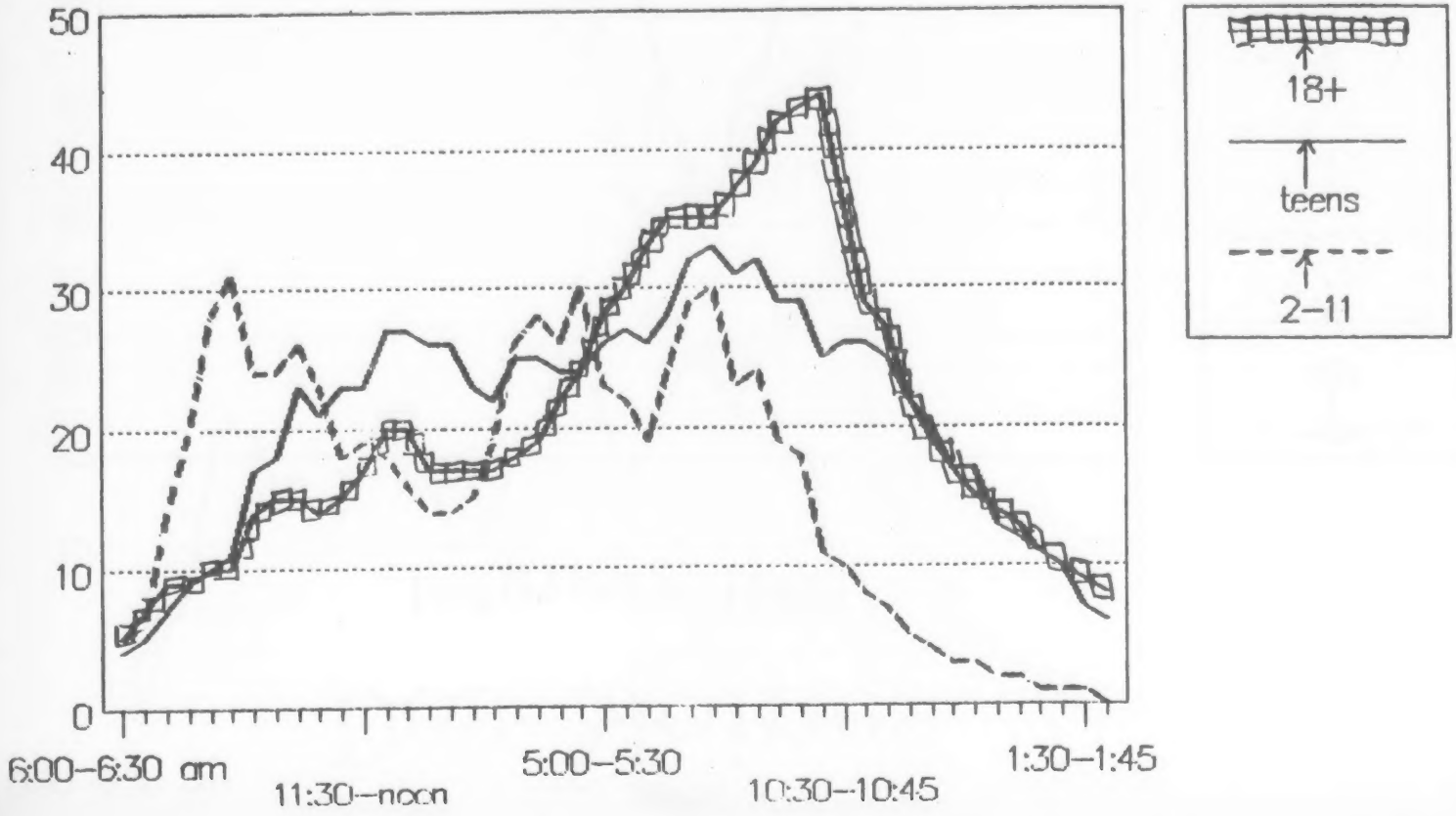



8381

CHART 4

# Chicago

## July 88




8382

CHART 3

11:30–noon 10:30–10:45

CHART 5

# Des Moines

## February 1988

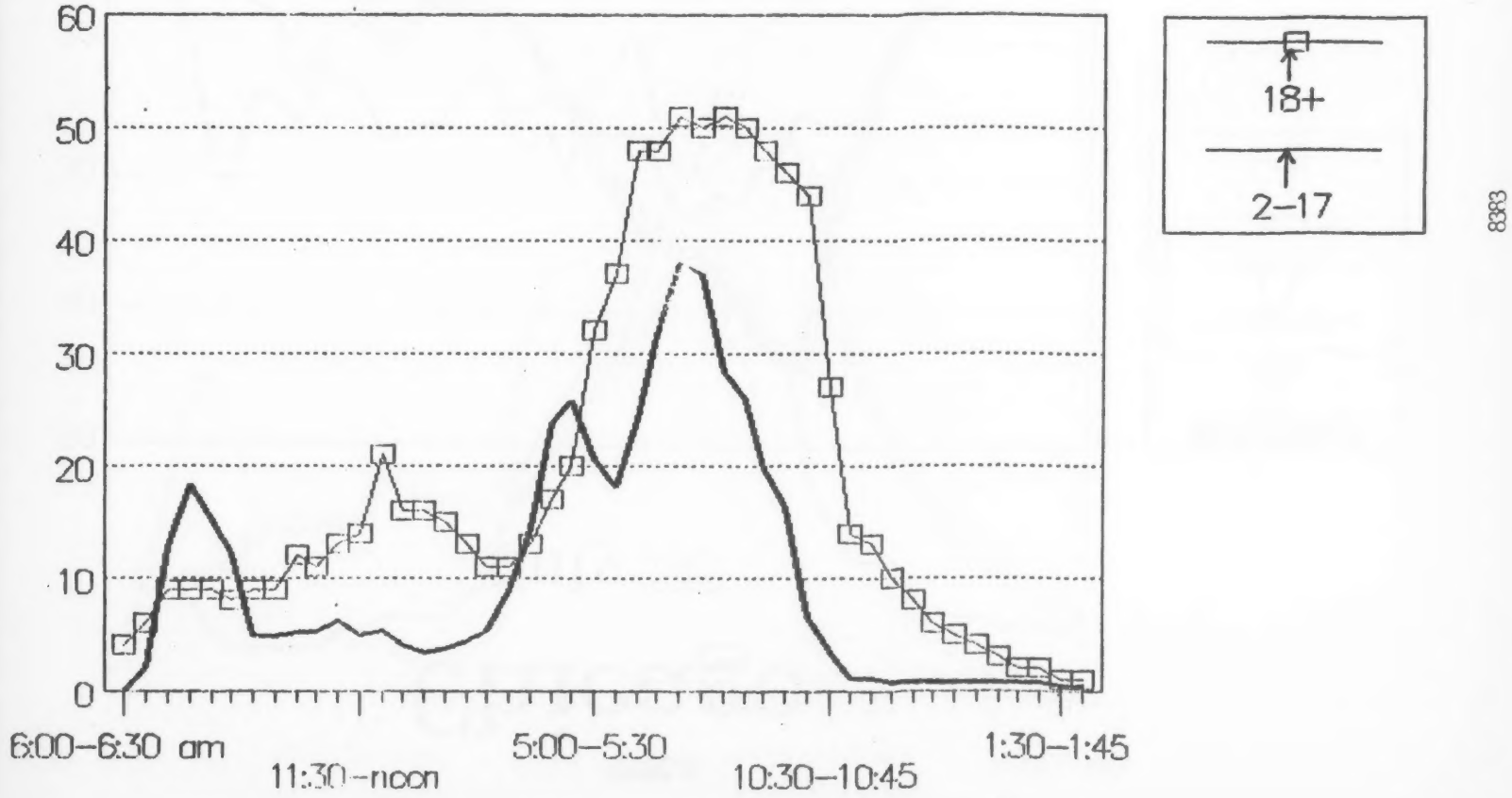


CHART 6

# Des Moines

## July 1988

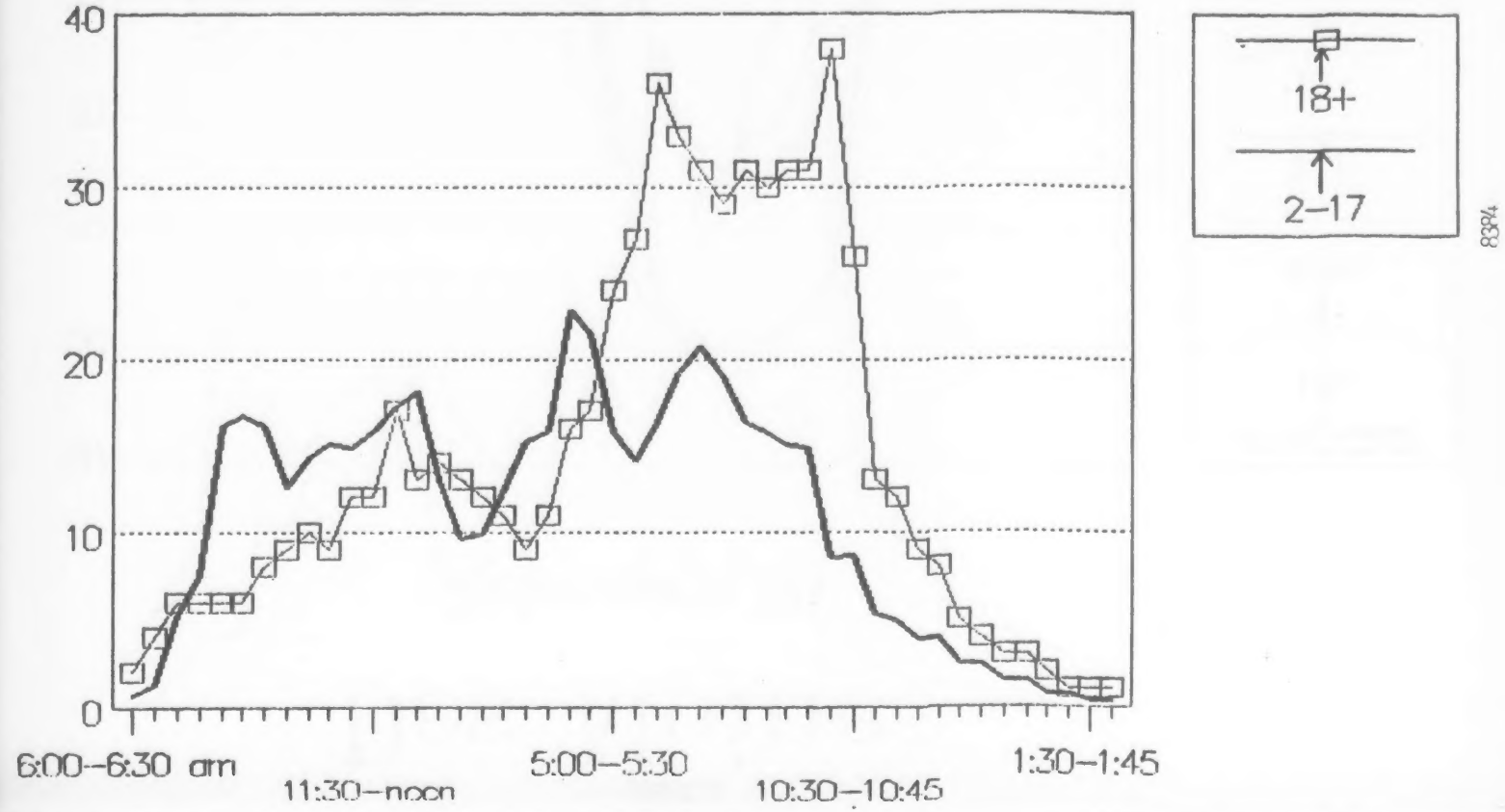



CHART 5

6:00–6:30 am
11:30–noon
5:00–5:30
10:30–10:45
1:30–1:45

CHART 7

# Des Moines

## February 88

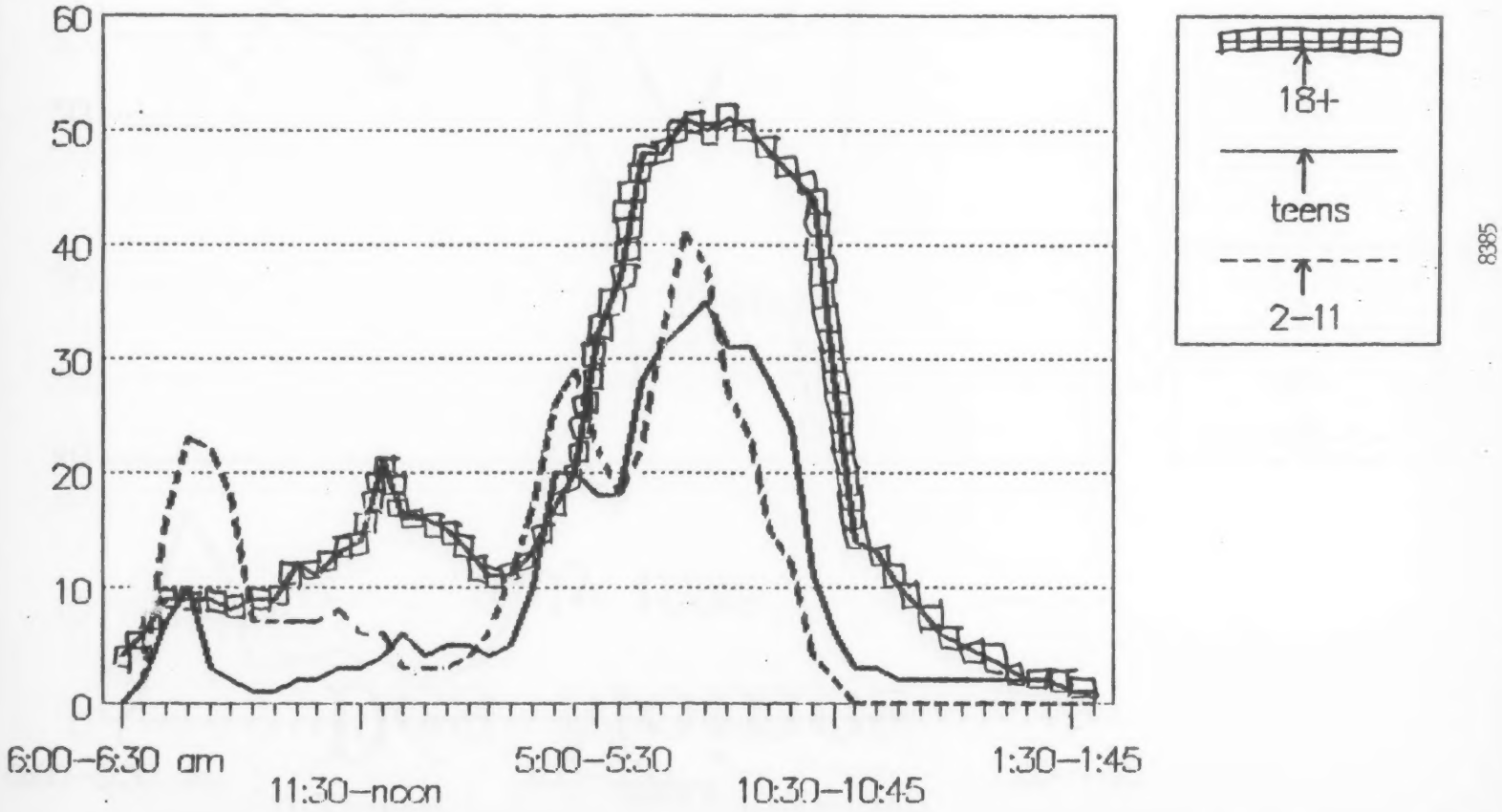


CHART 8

# Des Moines

## July 88

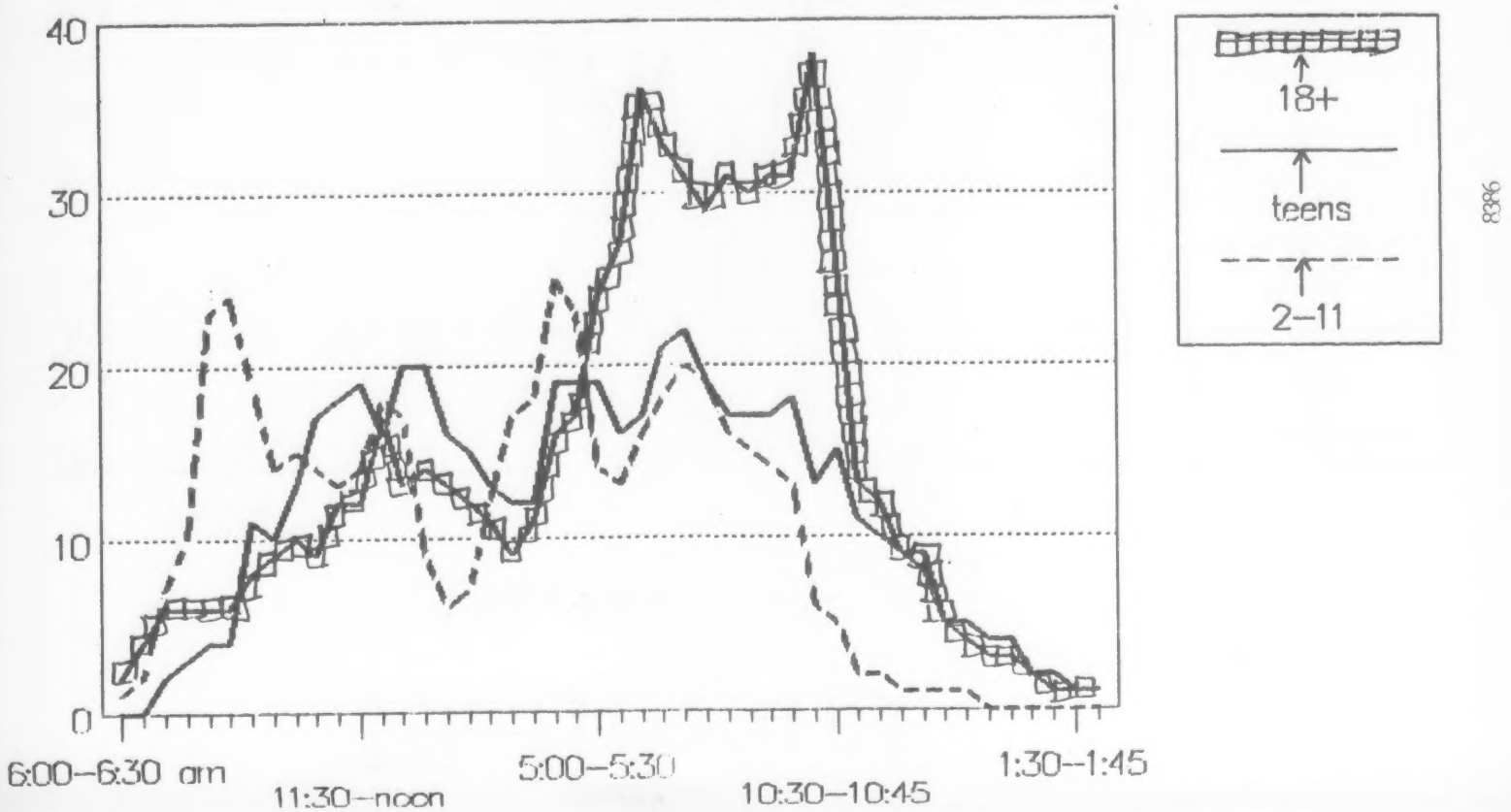



CHART 7

11:30–noon 10:30–10:45

CHART 9

# Richmond

## February 1988

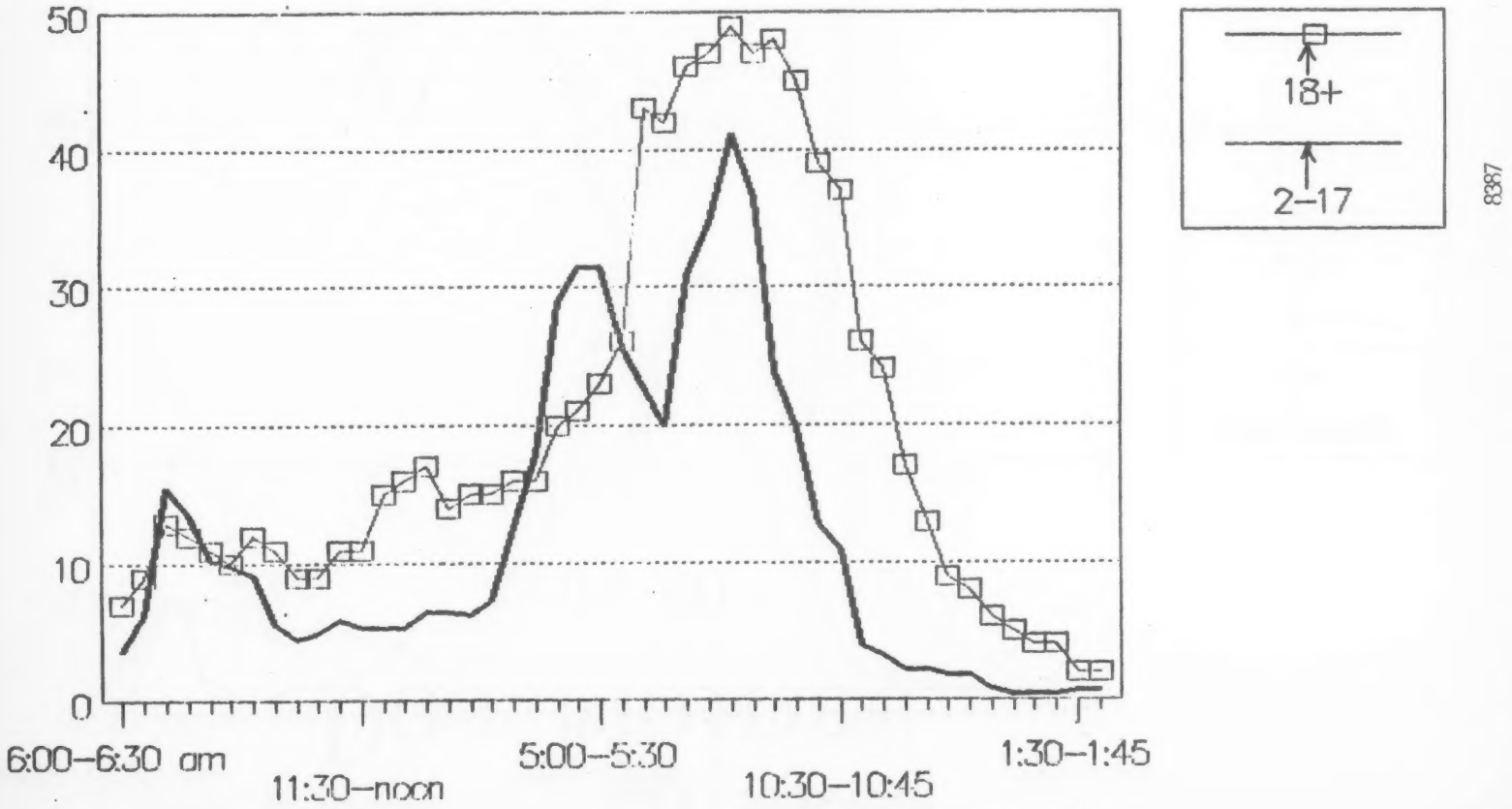
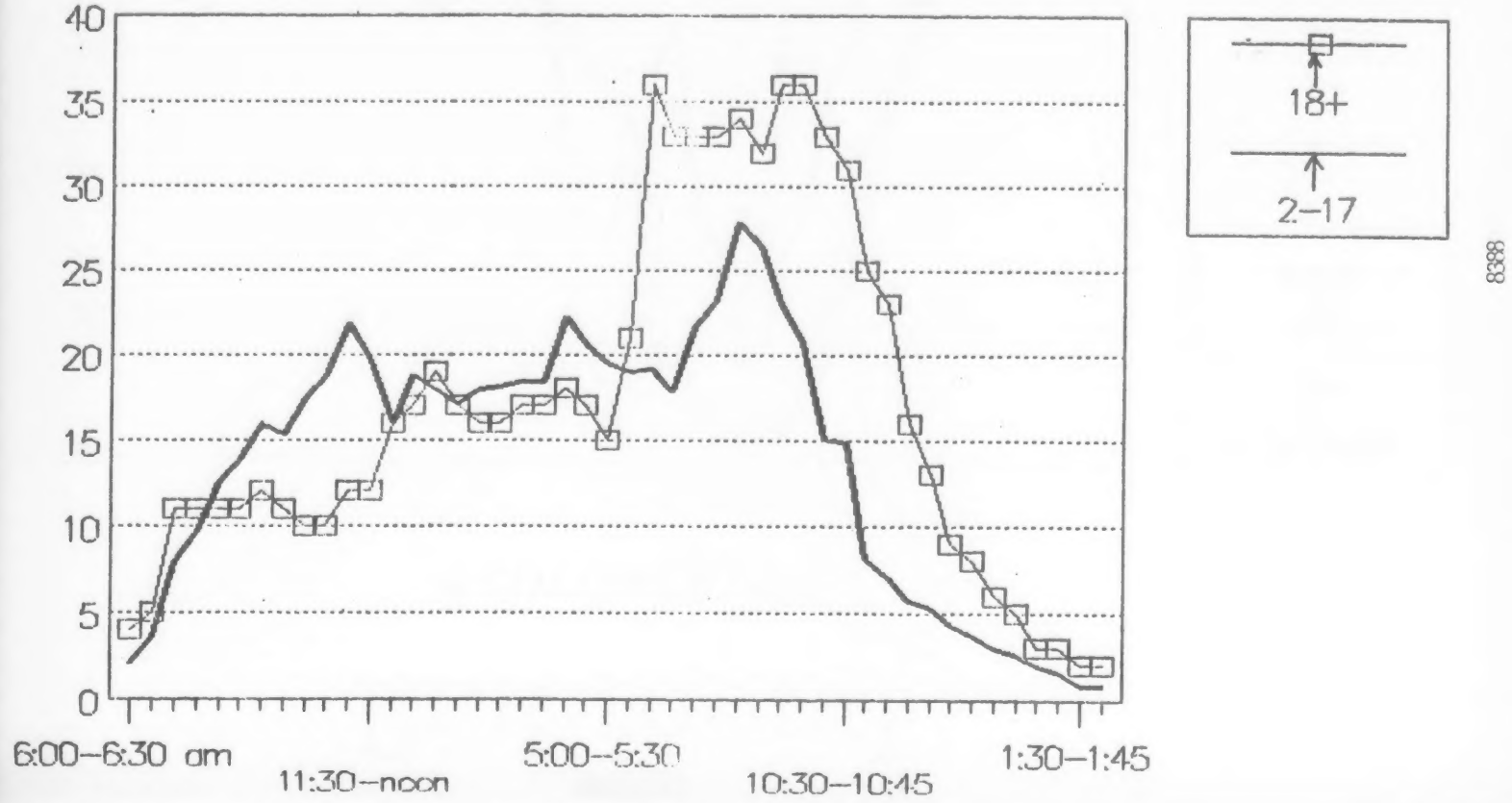


CHART 10

# Richmond

## July 1988




8888

CHART 9

11:30–noon 10:30–10:45

CHART 11

# Richmond

## February 88

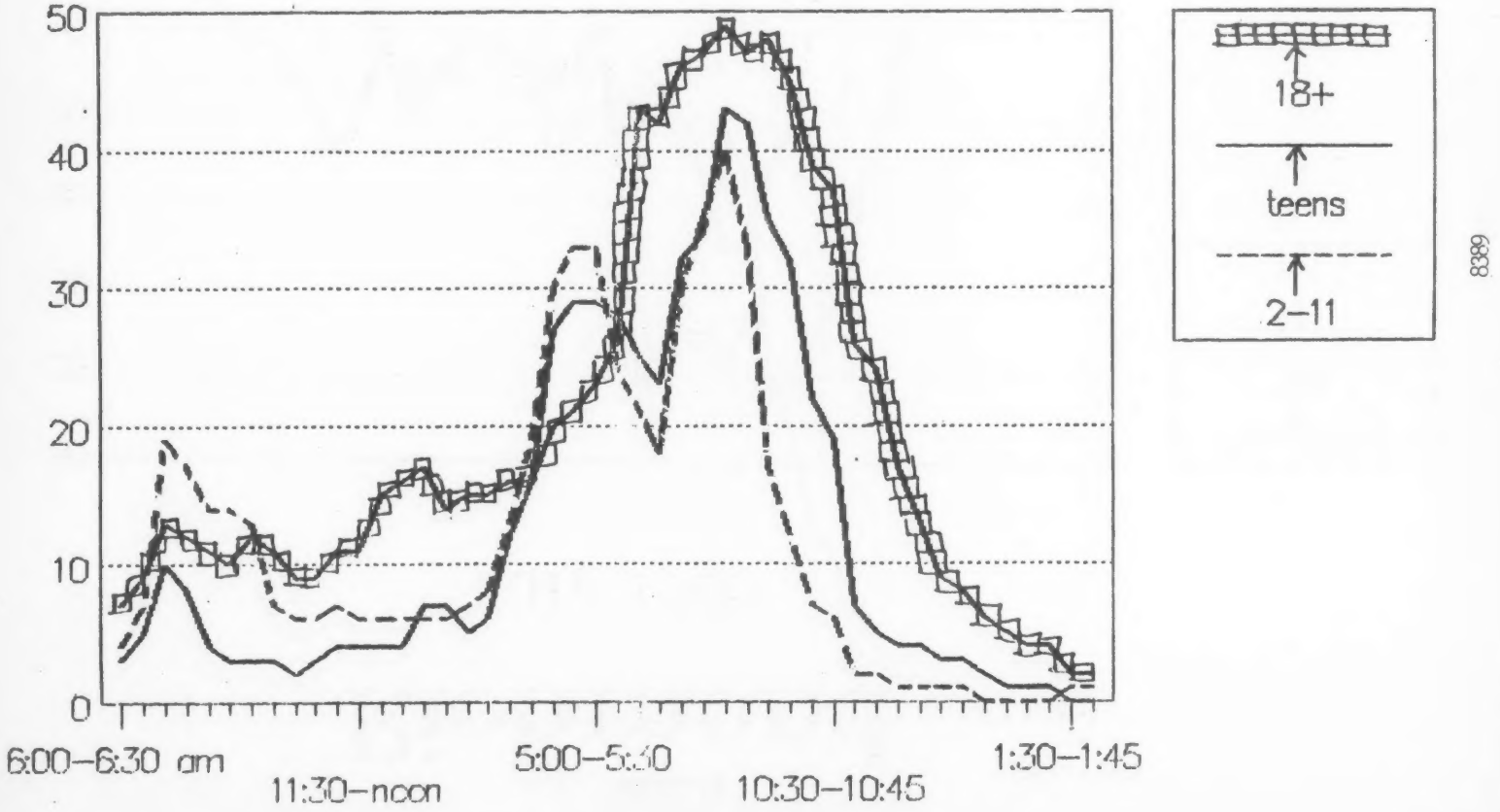


CHART 12

# Richmond

## July 88

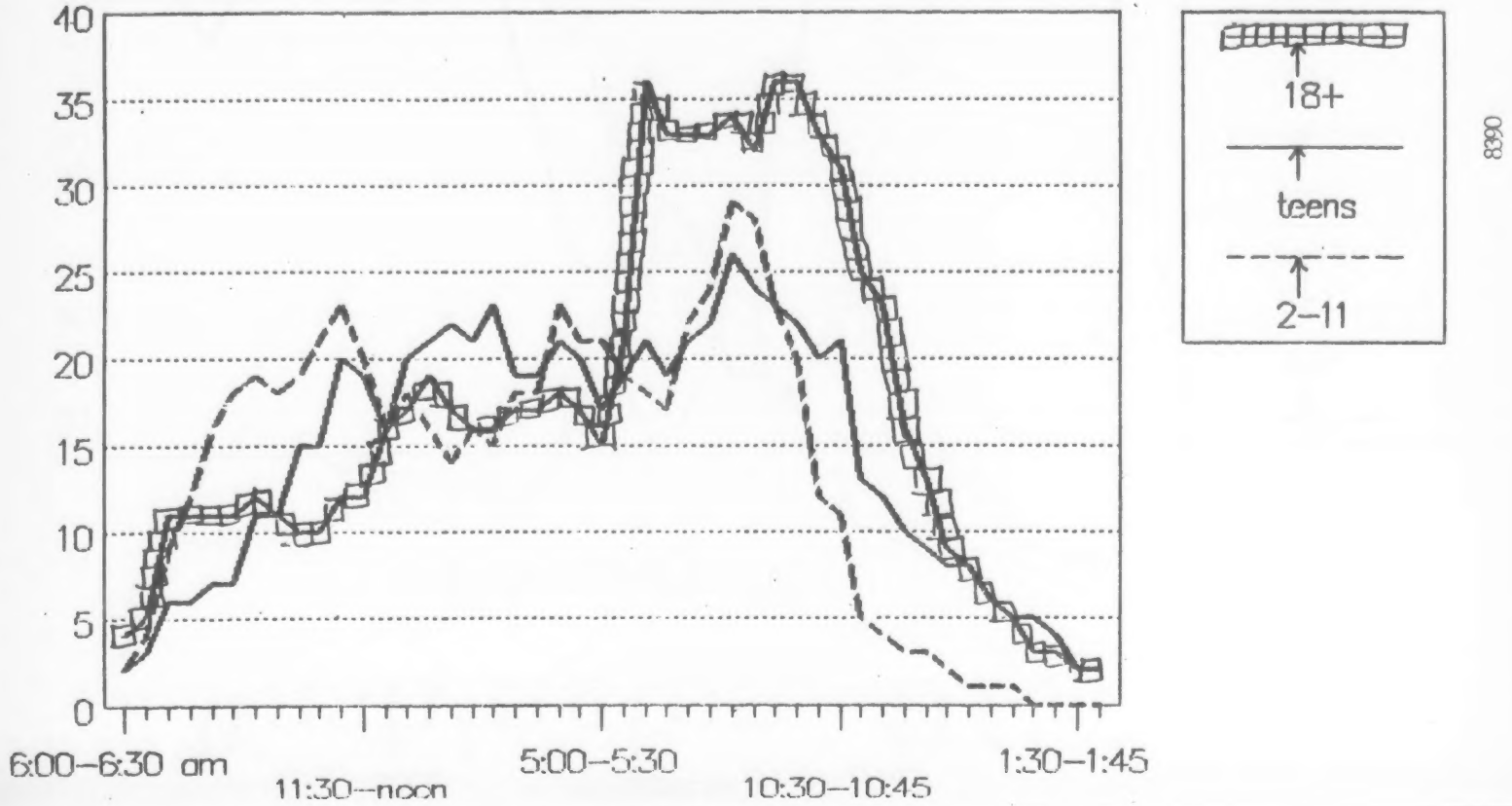



CHART 11

11:30–noon 10:30–10:45

CHART 13

# Washington, D.C.

## February 88

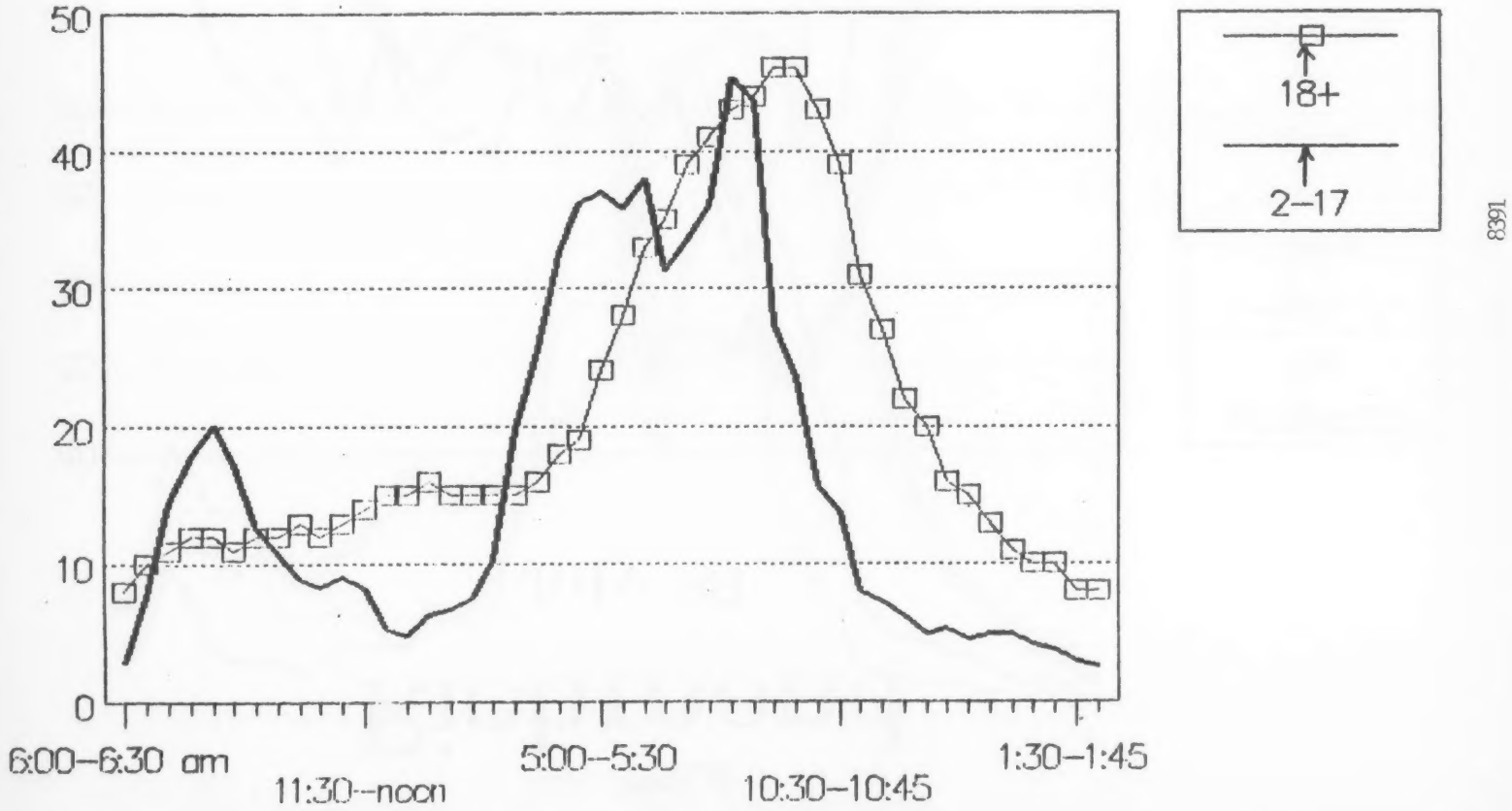
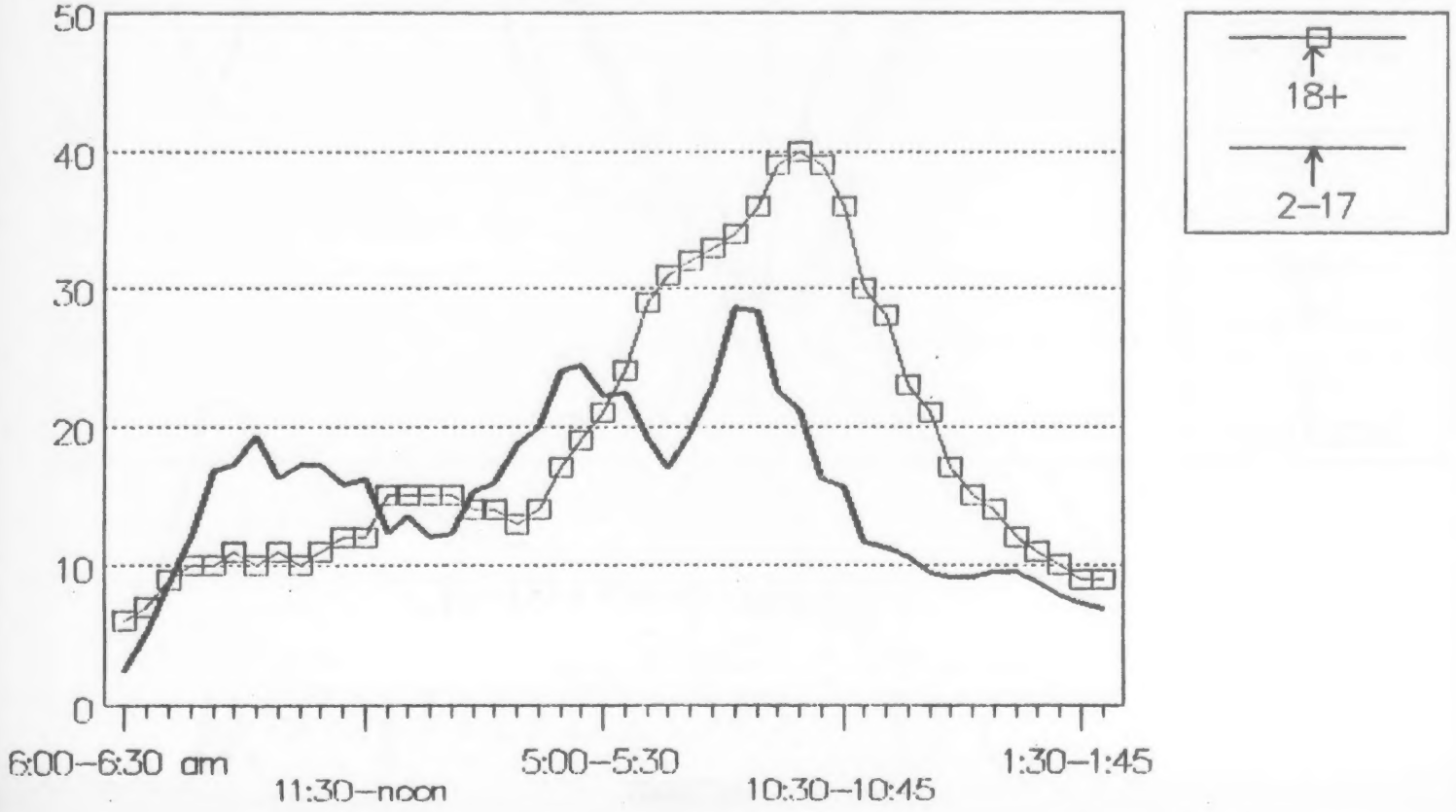


CHART 14

# Washington, D.C.

## July 88



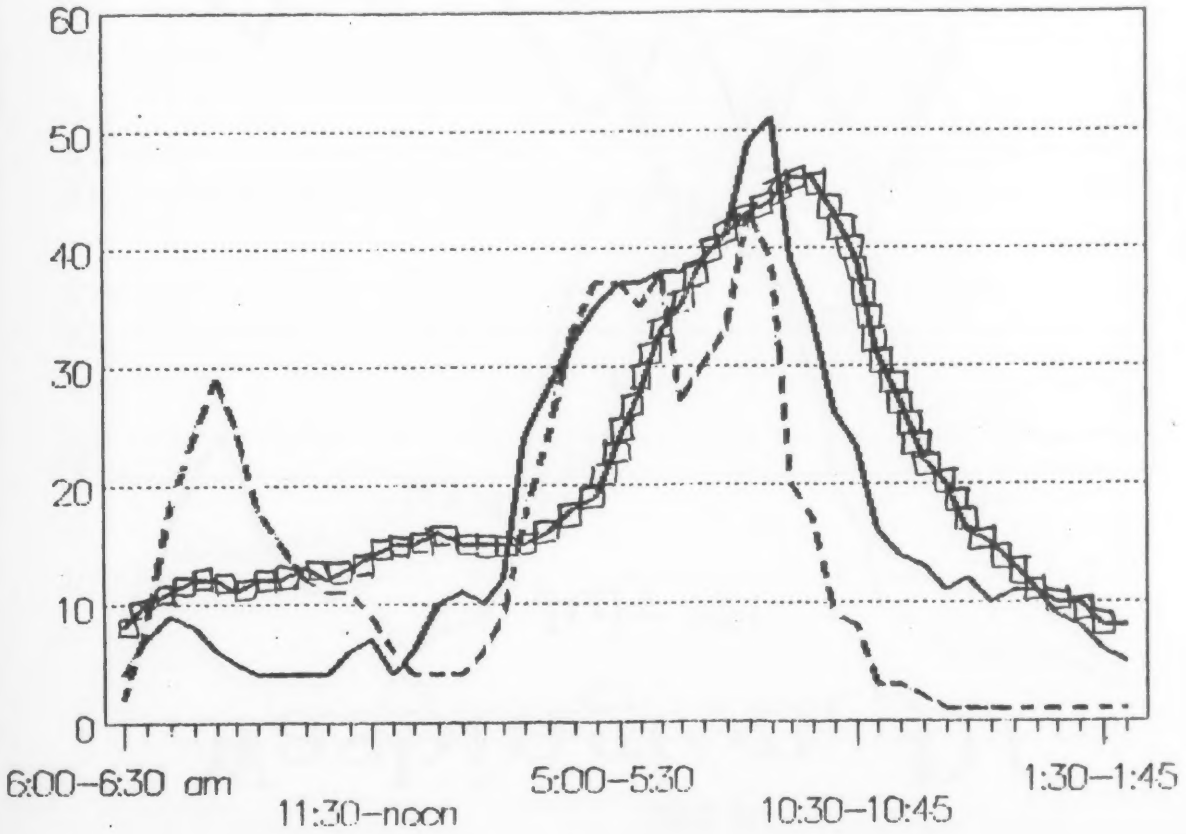

8392

CHART 13

CHART 15

# Washington, D.C.

## February 88



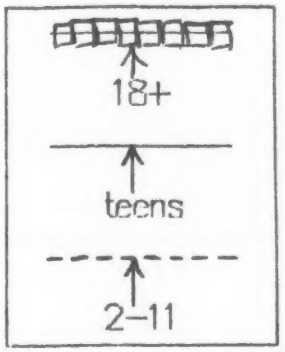




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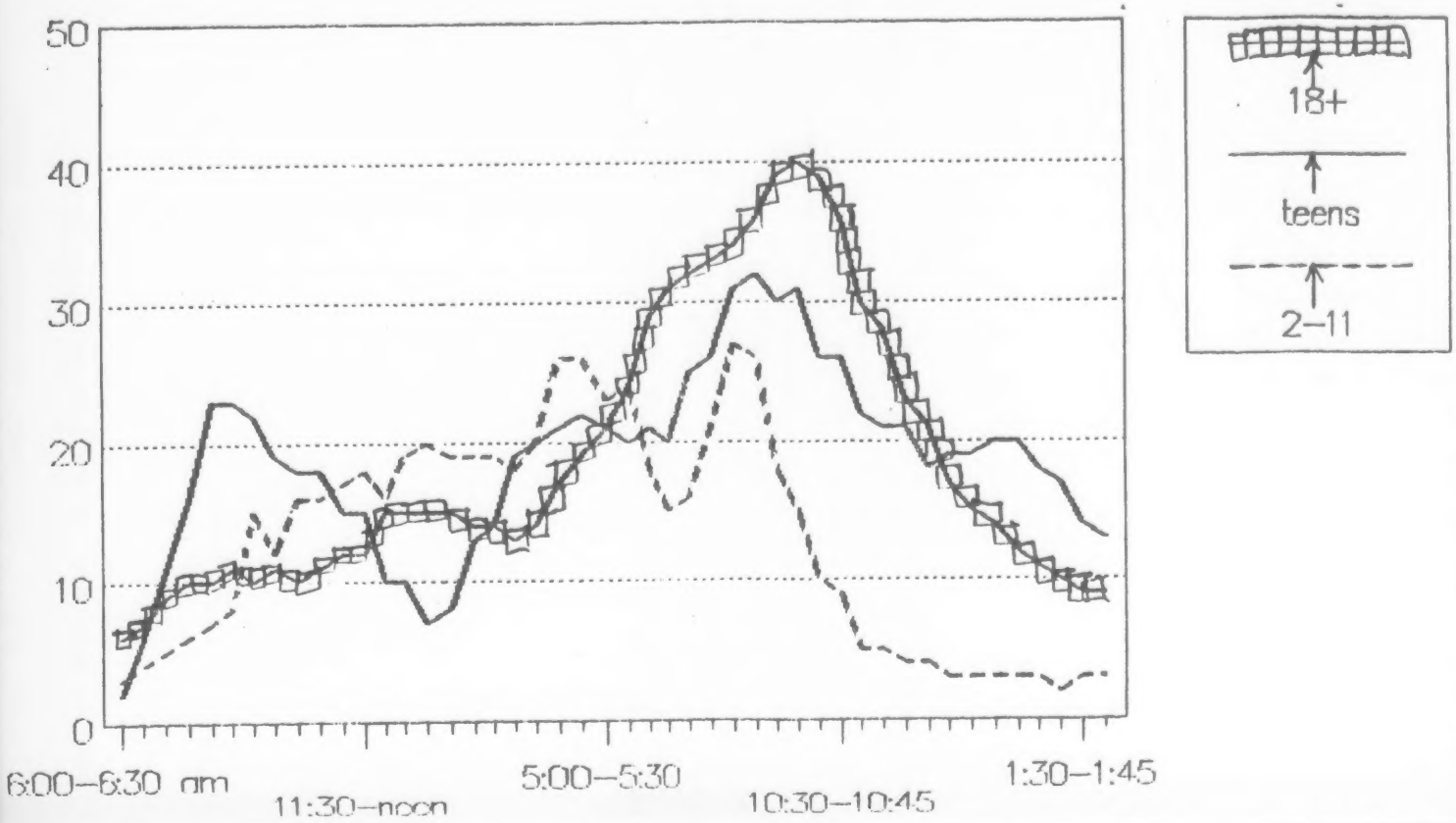
CHART 16

# Washington, D.C.

## July 88

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8304

CHART 15

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